S. HRG. 99-68

# LINE ITEM VETO

# HEARINGS

BEFORE THE

COMMITTEE ON
RULES AND ADMINISTRATION
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

## S. 43

TO PROVIDE THAT EACH ITEM OF ANY GENERAL OR SPECIAL APPROPRIATION BILL AND ANY BILL OR JOINT RESOLUTION MAKING SUPPLEMENTAL, DEFICIENCY, OR CONTINUING APPROPRIATIONS THAT IS AGREED TO BY BOTH HOUSES OF THE CONGRESS IN THE SAME FORM SHALL BE ENROLLED AS A SEPARATE BILL OR JOINT RESOLUTION FOR PRESENTATION TO THE PRESIDENT

MAY 14, 20, JUNE 20, 1985

Printed for the use of the Committee on Rules and Administration

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## Calendar No. 209

99TH CONGRESS
1ST SESSION

# S. 43

[Report No. 99–92]

To provide that each item of any general or special appropriation bill and any bill or joint resolution making supplemental, deficiency, or continuing appropriations that is agreed to by both Houses of the Congress in the same form shall be enrolled as a separate bill or joint resolution for presentation to the President.

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IN THE SENATE OF THE UNITED STATES

JANUARY 3, 1985

Mr. MATTINGLY (for himself, Mr. EVANS, Mr. BIDEN, Mr. THURMOND, Mr. ARMSTRONG, Mr. KASTEN, Mr. CHAFEE, Mr. DOLE, Mr. GRAMM, Mr. RUDMAN, Mr. MURKOWSKI, Mr. MCCONNELL, Mr. PRESSLER, Mr. ABDNOR, Mr. WILSON, Mr. WARNER, Mr. SYMMS, Mr. EXON, Mr. NICKLES, Mr. HELMS, Mr. HECHT, Mr. WALLOP, Mr. COCHRAN, Mr. SIMPSON, Mr. HEINZ, Mr. GRASSLEY, Mr. BOSCHWITZ, Mr. QUAYLE, Mr. SPECTER, Mr. TRIBLE, Mr. STEVENS, Mr. DANFORTH, Mr. DENTON, Mr. EAST, Mr. LUGAR, Mrs. KASSEBAUM, Mr. MCCLURE, Mr. PROXMIRE, Mr. HUMPHREY, Mr. GOLDWATER, Mr. D'AMATO, Mr. LAXALT, Mr. GARN, Mr. ZORINSKY, Mr. HOLLINGS, Mr. BOREN, and Mr. ROTH) introduced the following bill; which was read twice and referred to the Committee on Rules and Administration

JUNE 27 (legislative day, JUNE 26), 1985

Reported by Mr. MATHIAS, without amendment, unfavorably

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# A BILL

To provide that each item of any general or special appropriation bill and any bill or joint resolution making supplemental, deficiency, or continuing appropriations that is agreed to by both Houses of the Congress in the same form shall be enrolled as a separate bill or joint resolution for presentation to the President.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a)(1) notwithstanding any other provision of law, when any general or special appropriation bill or any bill or joint resolution making supplemental, deficiency, or continuing appropriations passes both Houses of the Congress in the same form, the Secretary of the Senate (in the case of a bill or joint resolution originating in the Senate) or the Clerk of the House of Representatives (in the case of a bill or joint resolution originating in the House of Representatives) shall cause the enrolling clerk of such House to enroll each item of such bill or joint resolution as a separate bill or joint resolution, as the case may be.

(2) A bill or joint resolution that is required to be enrolled pursuant to paragraph (1)—

(A) shall be enrolled without substantive revision,

(B) shall conform in style and form to the applicable provisions of chapter 2 of title 1, United States Code (as such provisions are in effect on the date of the enactment of this Act), and

(C) shall bear the designation of the measure of which it was an item prior to such enrollment, together with such other designation as may be necessary to distinguish such bill or joint resolution from other bills or joint resolutions enrolled pursuant to paragraph (1) with respect to the same measure.

(b) A bill or joint resolution enrolled pursuant to paragraph (1) of subsection (a) with respect to an item shall be deemed to be a bill under Clauses 2 and 3 of Section 7 of Article 1 of the Constitution of the United States and shall be signed by the presiding officers of both Houses of the Congress and presented to the President for approval or disapproval (and otherwise treated for all purposes) in the manner provided for bills and joint resolutions generally.

(c) For purposes of this concurrent resolution, the term "item" means any numbered section and any unnumbered paragraph of—

(1) any general or special appropriation bill, and

(2) any bill or joint resolution making supplemental, deficiency, or continuing appropriations.

(d) The provisions of this Act shall apply to bills and joint resolutions agreed to by the Congress during the two-calendar-year period beginning with the date of the enactment of this Act.

# LINE ITEM VETO

## To provide that each item of any general or special appropriation bill and any bill or joint resolution making supplemental, deficiency, or continuing appropriations that is agreed to by both Houses of the Congress in the same form shall be enrolled as a separate bill or joint resolution for presentation to the President

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TUESDAY, MAY 14, 1985

U.S. SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
*Washington, DC.*

The committee met, pursuant to call, at 9:48 a.m. in room 301 of the Russell Senate Office Building, Hon. Charles McC. Mathias, Jr. (chairman), presiding.

Present: Senators Mathias, Hatfield, Warner, Ford, Simon, and Gore.

Staff present: John B. Childers, staff director; William McW. Cochrane, minority staff director; Gerald W. Siegel, minority chief counsel; John K. Swearingen, director, technical services; Ann B. Cook, chief clerk; Peggy Parrish, professional staff member (minority); Carole J. Blessington, assistant chief clerk; Gerald Gereau, chief investigator; Dennis G. Doherty, auditor; Beth Cady, professional staff member; Waitus A. Dowless, professional staff member; Anthony L. Harvey, Sr., systems analyst (technical services).

### OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR., CHAIRMAN, COMMITTEE ON RULES AND ADMINISTRATION

The CHAIRMAN. The meeting will come to order. This morning we are meeting to hear testimony on Senate bill 43, to provide that each item of any general or special appropriation bill and any bill or joint resolution making supplemental, deficiency, or continuing appropriations that is agreed to by both Houses of the Congress in the same form shall be enrolled as a separate bill or joint resolution for presentation to the President—each item.

The distinguished junior Senator from Georgia, Mr. Mattingly, has been joined by 46 Senators in sponsoring this legislative proposal. President Reagan has requested the authority of this measure; it has been supported by others in the country.

The support, as I read it, is not expressed in a desire to shift power from the Congress to the President, but is as an expedient in dealing with the enormous Federal deficit.

Now, I think all of us share the goal and objective of reducing the deficit, but we do face some constitutional inhibitions in this subject. The Constitution, in Article I, specifies that "All legislative powers herein granted shall be vested in a Congress of the United States, . . ."

Senate bill 43 would appear to alter the constitutional relationship of the Congress to the Executive, and that certainly is one of the questions that we hope will be discussed at this hearing today. Surely it will be a subject of debate if this matter comes before the full Senate.

Now, as I have said, the unstated purposes, as I see it, of the sponsors of this legislation is to reduce the deficit, although that does not appear explicitly in the language of the bill.

So I think we have to ask several questions:

First, how will the measure reduce the deficit when it covers only 11 percent of the nondefense discretionary spending? The budget will never be controlled by exempting 89 percent of Federal spending from the control mechanism, whatever that may be.

Second, should this so-called line-item veto be extended to Social Security and other trust fund measures? Should it be extended to the Tax Code, because we do have tax expenditures as well as appropriations. Should we send the President a separate bill for each item in a tax package, just for example?

What would happen to the receipts and expenditure resolutions required by the Congressional Budget and Impoundment Control Act if the provisions of this bill were enacted? How could anyone in the Congress know what Federal spending was going to be for a given fiscal year?

I know the Senator from Oregon would remember, as I do, the outrage of the Congress a few years ago when the executive branch refused to spend funds that were authorized or mandated by statute. This is a proposal which goes much further than mere refusal of the Executive to expend appropriated funds.

Now, I don't want to prolong the meeting; I regret that I was a little delayed in getting here by a long-distance phone call. I do want to add just one more thing.

The President has asserted that he wants the line-item veto power in order to reduce the deficit and balance the budget. Well, of course, reducing the deficit is a subject that we all know more about this week than we did 1 week ago—it's a tough job, and we need all the tools we can get.

But as far as balancing the budget is concerned, of course, any President in the last 50 years has had the option, the freedom, the choice of sending the Congress a request for a balanced budget; it doesn't require legislation to do that—the President can do that any time he wants to

We are approaching the bicentennial of the Constitution. It's an anniversary which gives us an opportunity to reflect on the provisions of the Constitution. I think whatever the outcome of our consideration of this measure and of similar measures, we have to take a great deal of care to ensure that in the heat of a national issue, we don't abdicate the powers assigned by the Constitution to the elected representatives of the American people.

Governor Ford and Governor Hatfield have both been chief executives of States; they each have had personal experience far beyond my own in dealing with this particular budget and fiscal problem. Perhaps they would like to say something before we call on our first witness.

Governor Ford?

Senator FORD. Mr. Chairman, I yield the time for questions of our distinguished colleague here today—and I know Senator Hatfield is going to make a statement as relates to this.

So I will forgo any statement.

Senator HATFIELD. Thank you, Mr. Chairman. I will defer to the Senator from Georgia for his testimony, and I believe I will be giving testimony following him, so I will express my views on this ill-timed proposal at that time. [Laughter.]

The CHAIRMAN. The Senator from Georgia.

## TESTIMONY OF HON. MACK MATTINGLY, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator MATTINGLY. Thank you, Mr. Chairman and members of the committee.

I appreciate the opportunity that you have provided for——

Senator FORD. I resemble that remark.

Senator MATTINGLY [continuing]. The consideration of Senate bill 43, providing line-item veto authority to the President for a trial period of 2 years, or, perhaps more accurately, restoring to the Chief Executive his constitutionally guaranteed veto authority.

I owe a special thanks to Senator Dan Evans and Senator Joseph Biden for their involvement and assistance with this legislation.

I believe that our legislation, if enacted, will provide the Congress with an opportunity to examine the practical results and merits of a concept that has been discussed for more than 100 years. Providing the Chief Executive with line-item veto authority is, I am convinced, an idea whose time has come.

Actually, as the distinguished committee members probably know, S. 43 does not actually provide line-item veto authority to the President; more specifically, it provides item veto authority or, narrower still, section and paragraph veto authority. It does this by directing the appropriate officers of each body of Congress to instruct the enrolling clerks to enroll for presentation to the President each item—defined as all unnumbered paragraphs and unnumbered sections—in appropriations bills as separate pieces of legislation. The President would then be able to exercise his authority to approve or disapprove each piece of legislation. Any vetoed measure could be passed into law then over his veto with a two-thirds vote of each House.

I realize that appropriation bills, as a practical matter, will continue to originate in the House and that it will be functionaries in that body that carry out these legislative instructions. These same clerks already perform such ministerial tasks as are necessary for preparation and transmittal of appropriations bills to the President.

Congress, during committee markups, floor debate in each House, and conference committee deliberations, will continue to exercise total control over the exact composition of each piece of legislation and will be solely responsible for the product that is presented to the President.

The legislation has been constructed in a manner that meets the test of constitutionality—the same test that has frustrated previous efforts to enact a statutory line-item veto authority.

I understand that the opinion of Mr. Johnny Killian, a senior specialist in American law at the Congressional Research Service in the Library of Congress, will be entered for the record. Mr. Killian is of the view that S. 43 would meet the questions of constitutionality.

Enaction of statutory line-item authority, in turn, is critical because, by doing so, Congress will be able to speedily implement a measure that will be useful in helping to address the most serious fiscal problem that we have—a ballooning Federal deficit and the subsequent amount of debt that sooner or later, in one way or another, will destroy our economy. No family, no community, no State, and no Government can survive deficit spending over the long term.

New measures are necessary to rein in Federal spending that is clearly out of control.

It is little wonder that there is a growing unease among the American people about the impact that this spending spree will have on their wallets and, more importantly, on their children's future. The taxpayers' increasing skepticism about the ability of Congress to put our Nation' fiscal affairs in order is exceeded only by their overwhelming opposition to any increase in personal income tax rates as part of the solution.

Congress can take a bold step forward and signal its determination to pursue promising new solutions to today's fiscal problems by passing this proposal.

Now, let me be plain in stating at the outset that I do not believe, nor will I attempt to convince you, that the line-item veto proposal represents a total cure for all the fiscal distress that ails us, or, more accurately, that ails the taxpayers that we represent. This proposal is merely one weapon that I believe we should use in the fight to reduce Federal spending. It is not claimed to be or sold as a cure-all, a panacea, a nostrum, an elixir, or any other type of universal remedy.

Congress and its authorizing, budget, and appropriation committees is supposed to work in conjunction with the Chief Executive in reaching consensus on those measures that serve the public interest. If Congress acts as a bow, then the Presidential veto or, perhaps more importantly, the anticipation of it, acts as the arrow which strikes our spending targets. Removal of those arrows from the Chief Executive's quiver makes for a poor fiscal-control weapon.

I must say that I reject those arguments against this concept that have as their starting point the assumption that this proposal will, for various reasons, save only several billion dollars and thus, since such modest reductions will not cure or erase our enormous deficits, is not worthy of consideration or, more importantly, implementation on a trial basis. Frankly, if it would save spending of $1 million, it would be considered useful by the taxpayers of America.

I have cosponsored and voted for a balanced budget, tax limitation constitutional amendment. I continue to support that proposal and I believe that passage of such an amendment is another critically needed weapon in the battle to reduce the upward spiral of Federal spending.

But line-item veto authority, Mr. Chairman, should be viewed as another important tool in the attempt to construct a solid foundation for continued economic recovery and future economic growth.

Estimates of the savings that would be achieved through the line-item veto vary. It is worth noting that one estimate by the Heritage Foundation, suggests that had the line item veto been applied to the so-called "controllable", appropriated items in the budget and cut by 2 percent annually since 1974, outlays would have been reduced by approximately $50 billion. Coincidentally, is that not the level of savings that we have been trying to find during this recent debate on the fiscal year 1986 budget resolution?

I say to my friends on the committee that those are not insignificant savings. I can state without reservation that those levels of savings would be viewed as significant by my constituents. I suspect that that sentiment would be echoed by the taxpayers in your States. The argument of line-item veto opponents that says a $100,000, or a $1 million, or a $1 billion in savings is small potatoes is a view that has led to the current levels of the budget deficit.

This legislation is cosponsored by 46 other Senators, including Members from both sides of the aisle. It has received the specific endorsement of the President in his 1985 State of the Union Message. It has found additional advocates in such organizations as the Chamber of Commerce, the National Federation of Independent Businesses [NFIB], the American Tax Reduction Movement, the Foundation for the President's Private Sector Survey on Cost Control, and many more.

I submit for the record letters of support I have received from David Stockman at OMB, Treasury Secretary James Baker, J. Peter Grace, the Chamber of Commerce, the NFIB, and others.

The CHAIRMAN. Without objection, they will be included as part of the record.

Senator MATTINGLY. I might add that the NFIB notes that 67 percent of the members of that organization support the line-item veto proposal.

I would also like to ask the committee to include for the record a series of editorials that have appeared in The Wall Street Journal endorsing S. 43. I encourage the committee to read these insightful comments on the way that the Congress has managed, or mismanaged, our Nations fiscal affairs.

Mr. Chairman, support continues to grow across this country for the line-item veto. A companion measure introduced in the House of Representatives, H.R. 1247, by Congressman Dick Cheney, has already garnered significant bipartisan, cosponsorship support.

I believe that this broad and growing support stems from a view that not only is the idea worth a try because of the enormous deficits that we face, but also because the sunset provision that I and my colleagues have included in the legislation provides a fail-safe mechanism. The proposal calls for a 2-year trial period of the concept. The authority contained in S. 43 will automatically expire unless specifically renewed by the Congress. This provision, this insurance policy, protects the Congress and the people from the misuse of the item veto authority by checking extravagant inclinations on the part of the Chief Executive. Thus the proposal itself contains a provision that will help insure its judicious use and, at the same time, guarantees that misuse will lead inevitably to a swift and sure removal of the authority from the Executive.

The legislation thus establishes a balance or, in its own way, a system that contains both checks and balances.

And central to my belief in the need for this legislation, Mr. Chairman, is a conviction that the greater system of checks and balances provided for in our Constitution has been eroded over the years. The constitutionally provided veto power of the President has been debilitated by Congress through such practices as passage of omnibus appropriation bills, of bills that contain all manner of legislative provisions; bills that are passed ever closer to and sometimes even beyond the expiration of the fiscal year; bills that are so enormous that it is virtually impossible for any individual to know exactly what they contain—frightening examples crop up all the time; bills that bear little or no resemblance to the type of narrow item-specific, timely measures that were envisioned by the drafters of the Constitution.

Mr. Chairman, Prof. Judith Best, a distinguished teaching professor at State University College at Cortland in New York has contributed a valuable analysis of many of the issues, constitutional and otherwise, involved in the line-item veto debate. I ask that the committee include in the record an analysis of S. 43 prepared by her as well as an article written by Professor Best entitled "The Line Item Veto: Would the Founders Approve?" This article appeared in the Presidential Studies Quarterly in the spring of 1984, and I recommend these items to my colleagues as excellent examinations of the issues involved with the line-item veto.

Professor Best points to Lord Macaulay's adage "Reform that you may preserve," and uses that bit of advice as a starting point for her belief, shared by me, that Congress needs to pass S. 43 as a reform measure in order to preserve the checks and balances envisioned by those who wrote the Constitution. This rehabilitation is necessary, as I have said, because the legislative branch—not necessarily through any overt or evil intent, but possibly because of or by its very nature, has gradually whittled away and reduced the President's legitimate veto authority.

She argues that the Founders envisioned a veto authority that would be frequently exercised by the Chief Executive. Thus a qualified veto, subject to Congressional approval or override, and not an absolute veto, was included in the Constitution.

Mr. Chairman, the Founders, despite their acute familiarity with the excesses of a monarch, were not blind to the dangers posed by the legislative branch—that was one reason why a bicameral Congress was created.

The Founders viewed the veto as a moderating influence on the Congress as well as a means of protection for the executive branch. In fact, early Congresses, mindful of the veto authority possessed by the President, sent to him tightly constructed and itemized appropriation bills for his review. The veto was not frequently exercised in the early years of the Republic. It thus provided passive benefits through its anticipated use as well as those that stemmed from its direct application.

Alexander Hamilton pointed out in Federalist Paper No. 73 the "propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other." James Madison, writing in Federalist No. 48, notes the ineffectiveness of so-called "parchment barriers against the encroaching spirit of power" and he went on to cite in Federalist No. 49 the "tendency of republican governments to an aggrandizement of the legislative at the expense of the other departments."

It was in recognition of this tendency of the legislative branch to intrude on, or usurp, the legitimate rights of the other branches and in recognition of the ineffectiveness of mere parchment barriers that the President was given the power to veto legislation. As a critical element of the originally envisioned balance-of-power distribution by the Constitution among the three branches of our Government, it becomes imperative to rehabilitate or restore the veto—and S. 43 accomplishes this purpose. View it, if you will, as an historical preservation project to the U.S. Constitution.

Once again, I appreciate the opportunity to testify on behalf of S. 43, the line-item veto trial. I respectfully ask and urge that the measure be reported from the Rules Committee with whatever recommendations the members decide upon so the full Senate can debate and vote on the proposal.

Thank you, Mr. Chairman.

[The following statements and items were received and requested to be included in the record:]

### PREPARED STATEMENT OF SENATOR MACK MATTINGLY, A U.S. SENATOR FROM THE STATE OF GEORGIA

Mr. Chairman and members of the committee, I appreciate the opportunity that you have provided for the consideration of Senate bill 43, providing line item veto authority to the President for a trial period of two years, or perhaps more accurately, restoring to the Chief Executive his constitutionally guaranteed veto authority.

I owe a special thanks to Senator Dan Evans and Senator Joseph Biden for their involvement and assistance with this legislation.

I believe that our legislation, if enacted, will provide the Congress with an opportunity to examine the practical results and merits of a concept that has been discussed for more than 100 years. Providing the Chief Executive with line item veto authority is, I am convinced, an idea whose time has come.

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I realize that appropriation bills, as a practical matter, will continue to originate in the House and that it will be functionaries in that body that carry out these legislative instructions. These same clerks already perform such ministerial tasks as are necessary for transmittal of appropriation bills to the President.

Congress, during committee mark-up, floor debate in each House, and conference committee deliberations, will continue to exercise total control over the exact composition of each piece of legislation and will be solely responsible for the product that is presented to the President.

The legislation has been constructed in a manner that meets the test of constitutionality—the same test that has frustrated previous efforts to enact a statutory line item veto authority.

I understand that the opinion of Mr. Johnny Killian, a senior specialist in American law at the Congressional Research Service will be entered for the record. Mr. Killian is of the view that S. 43 would meet questions of constitutionality.

Enaction of "statutory line item authority," in turn, is critical because by doing so, Congress will be able to speedily implement a measure that will be useful in helping to address the most serious fiscal problem that we face—a ballooning Federal deficit and the subsequent amount of debt that sooner or later, if one way or another, will destroy our economy. No family, no community, no State, and no government can survive deficit spending over the long term.

If anyone doubts that new measures are necessary to rein in Federal spending that is clearly out of control, consider the following:

It took more than 200 years, until 1981, for the total Federal debt to reach $1 trillion. But, unless Congress acts to prevent it, the $2 trillion level will be passed in 1986, and debt levels will rocket close to $3 trillion by 1990;

The median American family today earns about 7.5 times more income than it did in the late 1940's but its income tax burden has increased 246 times;

Twenty-five years ago, Federal receipts equaled 18.6 percent of the Nation's gross national product (GNP); today, annual receipts are 19 percent of GNP. Spending, though, has risen from 18.5% of GNP in 1960 to an estimated current level of 24%.

It is little wonder that there is a growing unease among the American people about the impact that this spending spree will have on their wallets and, more importantly, on their children's future. The taxpayer's increasing skepticism about the ability of Congress to put our fiscal affairs in order is exceeded only be their overwhelming opposition to any increase in personal income tax rates as part of the solution.

New methods are clearly needed to restrain the growth of Federal spending. Congress can take a bold step forward and signal its determination to pursue promising new solutions to today's fiscal problems by passing this proposal.

Let me be plain in stating at the outset that I do not believe nor will I attempt to convince my colleagues, that my line item veto proposal represents a total cure for the fiscal distress that ails us or more accurately, that ails the taxpayers that we represent. This proposal is merely one weapon that I believe we should use in the fight to reduce Federal spending. It is not claimed to be or sold as, a cure all, a panacea, a nostrum, an elixir, or any other type of universal remedy.

Congress and its authorizing, budget and appropriating committees, is supposed to work in conjunction with the Chief Executive in reaching consensus on those measures that serve the public interest. If Congress acts as a bow, then the Presidential veto or, perhaps more importantly, the anticipation of it, acts as the arrow which strikes our spending targets. Removal of those arrows from the Chief Executive's quiver makes for a poor fiscal control weapon.

I must say that I reject those arguments against this concept that have as their starting point the assumption that this proposal will, for various reasons, save "only" several billion dollars and thus, since such modest reductions will not cure or erase our enormous deficits, is not worthy of consideration or more importantly, implementation on a trial basis. Frankly, if it would save spending of $1 million, it would be considered useful by the taxpayers of America.

I have cosponsored and voted for a balance budget (tax limitation) constitutional amendment. I continue to support that proposal and I believe that passage of such an amendment is another critically needed weapon in the battle to reduce the upward spiral of Federal spending.

But line item veto authority, Mr. Chairman, should be viewed as another important tool in the attempt to construct a solid foundation for continued economic recovery and future economic growth.

Estimates of the savings that would be achieved through the use of line item veto authority vary. It is worth noting, however, that one estimate (by the Heritage Foundation) suggests that had the item veto been applied only to the so-called "controllable" appropriated items in the budget and cut by 2% annually since 1974, outlays would have been reduced by $49 billion dollars. Coincidentally, is it not roughly $50 billion dollars in deficit reductions for fiscal year 1986 that we are presently attempting to find?

I say to my friends on the committee, that those are not insignificant savings; the people west of the Potomac do not believe that those are insignificant savings and I can state without reservation that those levels of savings would be viewed as significant by my constituents. I suspect that that sentiment would be echoed by the taxpayers in your States. The argument of line item opponents that says a hundred throusand dollars, or a million, or a billion in savings is small potatoes is a view that has led to current levels of deficit spending.

This legislation, which now enjoys the cosponsorship of 46 Senators including Members from both sides of the aisle, and which received the specific endorsement of the president in his 1985 State of the Union message, has found additional advocates in such organizations as the chamber of commerce, the National Federation of Independent Business' (NFIB), the American Tax Reduction Movement, the Foundation for the Presidents Private Sector Survey on Cost Control, and many more. I insert for the record, letters of support I have received from Office of Management and Budget Director David Stockman; Treasury Security James Baker; J. Peter Grace; the chamber of commerce; and the NFIB. I note that in his letter to me dated February 28, 1985, Mr. John Motley, director of Federal legislation for the NFIB, states that his polls indicate a 67% support level for the line item veto.

I would also ask the committee to include for the record a series of editorials that have appeared in the Wall Street Journal, endorsing S. 43. I encourage all my colleagues on the committee to take the time to read these insightful comments on the way we manage, or mismanage, our Nation's fiscal affairs.

Mr. Chairman, support continues to grow for the proposal. Editorials and articles have appeared in many and varied periodicals and newspapers urging prompt congressional action. A companion measure in the House of Representatives, H.R. 1247, introduced by Congressman Richard Cheney, already has a bi-partisan cosponsorship list.

I believe that this broad and growing support stems from a view that not only is the idea worth a try because of the enormous deficits that we face, but also because the sunset provision that I and my colleagues have included in the legislation provides a fail-safe mechanism.

The proposal calls for a two year trial period of the concept. The authority contained in S. 43 will automatically expire unless specifically renewed by the Congress. This provision, this insurance policy, protects the Congress and the people from misuse of the item veto authority by checking extravagant inclinations on the part of the Chief Executive. Thus, the proposal itself contains a provision that will help insure it's judicious use and at the same time guarantees that misuse will lead inevitably to a swift and sure removal of the authority from the executive. The legislation thus establishes a balance or, in its own way, a system that contains both checks and balances.

And central to my belief in the need for this legislation, Mr. Chairman, is a conviction that the greater system of checks and balances provided for in our Constitution has been eroded over the years. The constitutionally provided veto power of the President has been debilitated by Congress through such practices as passage of omnibus appropriation bills; of bills that contain all manner of legislative provisions; bills that are passed ever closer to and sometimes even beyond the expiration of the fiscal year; bills that are so enormous that it is virtually impossible for any individual to know exactly what they contain (frightening examples pop up almost daily); bills that bear little or no resemblance to the type of narrow, item specific, timely measures that were envisioned by the drafters of the Constitution.

Mr. Chairman, Professor Judith Best, distinguished teaching professor at State University College at Cortland in New York has contributed a valuable analysis of many of the issues, constitutional and otherwise, involved in the line item veto debate. I ask that the committee include in the record at this point the article written by professor Best entitled "The line item veto: Would the founders approve?" This article appeared in the Presidential Studies Quarterly in spring of 1984 and I recommend it to my colleagues as an excellent examination of the issues involved with the item veto.

Professor Best points to Lord Macaulay's adage "Reform that you may preserve" and uses that bit of advice as a starting point for her belief, (shared by me), that Congress needs to pass S. 43 as a reform measure in order to preserve the checks and balances envisioned by those who wrote the Constitution. This rehabilitation is necessary, as I have said, because the legislative branch—not necessarily through any overt or evil intent—but possibly because of or by its very nature, has gradually whittled away and reduced the President's legitimate veto authority.

She argues that the founders envisioned a veto authority that would be frequently exercised by the Chief Executive, thus a qualified veto subject to congressional approval or override and not an absolute veto, was included in the Constitution. Mr. Chairman, the Founders, despite their acute familiarity with the excesses of a monarch, were not blind to the dangers posed by the legislative branch, that was one reason why a bi-cameral Congress was created.

The Founders viewed the veto as a moderating influence on Congress as well as a means of protection for the executive branch. In fact, early Congress', mindful of the veto authority possessed by the President, sent to him tightly constructed and itemized appropriation bills for his review. The vetc was not frequently exercised in the early years of the Republic. It thus provided passive benefits through its anticipated use as well as those that stemmed from its direct application.

Alexander Hamilton pointed out in Federalist paper #73 the "propensity of the legislative department to intrude upon the rights, and to absorb the powers of the other." James Madison, writing in the Federalist #48 notes the ineffectiveness of so-called "parchment barriers against encroaching spirit of power" and cited in Federalist #49 the ". . . tendency of Republican governments to an aggrandizement of the legislative at the expense of the other departments."

It was in recognition of this tendency of the legislative branch to intrude on, or usurp, the legitimate rights of the other branches and in recognition of the ineffectiveness of mere parchment barriers that the President was given the power to veto legislation. As a critical element of the originally envisioned balance of power distribution by the Constitution among the three branches of our Government, it becomes imperative to rehabilitate o restore the veto and S. 43 accomplishes this purpose. View it, if you will, as an historical preservation project to the U.S. Constitution.

Once again, I appreciate the opportunity to testify on behalf of S. 43 (line item veto trial). I respectfully ask and urge that the measure be reported from the Rules Committee with whatever recommendations the members decide upon, so the full Senate can debate and vote on the proposal.

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U.S. Senate,
Office of the Majority Leader,
*Washington, DC, May 13, 1985.*

Hon. Charles McC. Mathias,
*Chairman, Committee on Rules and Administration, U.S. Senate, Washington, DC.*

Dear Mac: I understand you have scheduled a hearing in the Rules Committee May 14 on the subject of S. 43, Senator Mattingly's time veto proposal. This is to urge you that we do whatever we can to expedite Senate action on this legislation.

As you probably know, I have supported the item veto for some time. In 1977, I cosponsored with Senator Lugar a proposed constitutional amendment giving the President item veto power. I believe the Mattingly bill will give us appropriate experience with the item veto at the statutory level. Certainly it is very important that we give the proposal a try, given the poor track record of the present system in controlling spending.

An item veto is a proper remedy for the problem of overspending. Right now there is no way to ensure that Congress adheres to its agreement to limit appropriations. The President has only a take-it-or-leave-it option on omnibus appropriation bills. An item veto will give both the President and Congress more leverage incontrolling individual spending items. It would not disturb the fundamental roles of the President and Congress, nor would it interfere with the current budget process.

We need the item veto as an additional weapon in the battle for fiscal responsibility. I would like to have S. 43 available for floor action immediately following the Memorial Day recess, or as soon thereafter as possible. Please let me know if there is anything I can do to advance that goal.

Sincerely yours,

Bob Dole,
*Majority Leader.*

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## Congressional Research Service, the Library of Congress, American Law Division

### CONSTITUTIONAL QUESTIONS RAISED BY S. 43 IN ESTABLISHING ITEM VETO

(By Johnny H. Killian, Senior Specialist)

This is in response to your request for a brief consideration of S. 43, 99th Congress, proposing to create the item veto by statute, by reference to the constitutional discussion in our report entitled "Constitutionality of Empowering Item Veto by Legislation," dated January 4, 1984.

The bill would achieve the item veto through direction to the officer of the originating legislative body to take any appropriations bill passed in the same form by both Houses and to divide it into separate bills conforming to the numbered sections or unnumbered paragraphs of the original bill. These bills are then sent to the President who may sign or veto each separate bill as he wishes. Congress could override any veto as it currently does.

Without elaborating in any detail the discussion in the previous report, we can summarize the constitutional considerations as follows: Under the Constitution, the President must sign or veto bills coming to him from Congress, irrespective of the fact that any particular bill may contain provisions he favors and other provisions he does not favor. The President's veto power is an intrusion into the lawmaking function of Congress which the Constitution specifically provides for. Expansion of the President's power in this respect implicates the separation of powers doctrine, which is one of the bedrock principles of our constitutional governance. Whether that expansion would be unconstitutional is, of course, another question requiring evaluation whether it would violate an express provision of the Constitution or, if not, whether it would be invalidated because of its disruption or potential disruption of the assigned functions of one or another branch.

"Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. . . . These provisions of Art. I are integral parts of the constitutional design for the separation of powers." *INS* v. *Chadha*, 103 S. Ct. 2764, 2781 (1983). The relevant sections of the Constitution require passage by both Houses of Congress of a bill in the same form, presentation to the President, and his signature or the enactment of the bill over his veto by the required majorities. Departure from these processes leading to a greater intermixture of functions as between the legislative and executive branches seems to raise a presumption that constitutional boundaries have been crossed. "It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." ID., 2784.

Evident it would appear to be that simply to authorize the President to pick and choose among provisions of the same bill would be to contravene this procedure. In S. 43, however, a different tack is chosen. Separate bills drawn out of a single original bills are forwarded to the President. In this fashion, he may pick and choose. The formal provisions of the presentation clause would seem to be observed by this device. The question that would appear to be raised is whether the provisions setting forth Congress' role in lawmaking have been complied with. Both Houses have passed a single bill and this bill comprises the no-doubt numerous compromises within each House and between the two Houses; the resulting bill may be balanced and contain provisions accepted by some in return for acceptance of provisions they wish. This bill is then separated into what may be artificial parts and transformed into separate bills as a ministerial act by an employee of one House. These bills are then sent to the President without ever being passed again by the two Houses. Does this process comport with Article I?

Of course, it is true that the Constitution does not mandate compromise in bills passed by Congress, it only makes compromise possible. And even under S. 43, Congress retains its ability to ensure that any compromises are kept inviolate from the President's veto. The officer dividing up the bill must make separate bills out of numbered sections and unnumbered paragraphs. Nothing would prevent Congress from protecting a compromise by placing two or more disparate provisions into the same section or paragraph.

But the more interesting question is whether Congress may comply with Article I though passage of a single bill and then direct its separation into a series of bills which Congress then does not again take up. Each House has the power under Article I, § 5, cl. 2, to "determine the Rules of its Proceedings," and in S. 43 this power is exercised in § 2(b) by deeming each enrolled bill to comply with clauses 2 and 3 of § 7. The bicameralism requisite, however, arises from § 1 of Article I, vesting legislative power in the two Houses. *INS* v. *Chadha, supra,* 2783. Therefore, the issue is a not insubstantial one, inasmuch as upon its resolution turns the answer to the question whether the President's power under the presentation clause is legally enhanced or whether the enlargement is simply a de facto one.

Because there is no judicial precedent and no known legislative precedent in the congressional context to apply to the fact situation, it is not possible to attempt any definitive resolution of this question. However, the resolution may lie in the observation that compliance with the bill if enacted and its effectuation is wholly within Congress' discretion. Congress in passing the original bill may combine into single sections any of a number of disparate parts and in fact it could enact a lengthy and complex measure in one numbered section or one unnumbered paragraph comprising the entire bill. Because Congress retains full control over the process, it would perhaps be excessive formalism to require that each separated bill be again passed by both Houses. While true, perhaps, to the letter of Article I, such a requirement would in fact be unnecessary to achieve what Article I necessitates in the process of lawmaking.

Not only must we be concerned, when considering separation of powers issues, with sp ecific constitutional provisions which a govermental action may violate, but there are as well structural and "inherent" guaranties of separation. Thus, in *Myers* v. *United States*, 272 U.S. 52 (1926), the Court held unconstitutional a legislative limitation upon the President's power to remove officers of the executive branch, not because any specific provision of the Constitution conferred on the President or denied to Congress the power of removal under the circumstances, but because the Court discerned in the nature of executive power the necessity of having removal authority. The Court has since distilled the doctrinal essence to be applied in the absence of a specific constitutional provision to be, first, whether the action of the moving branch threatens to prevent another "from accomplishing its constitutionally assigned functions," and, second, where there is a "potential for disruption" it must be determined "whether that impact is justified by the overriding need to promote objectives within the constitutional power" of the moving branch. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 442–443 (1977); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753–745 (1982).

Here, it would appear to be evident that a successful conferral upon the President of the item veto would constitute an enlargement of presidential power and a diminution of congressional power, simply as a matter of fact. Whether this shift of power would constitute, in constitutional terms, a potential for prevention of the exercise by Congress of its constitutionally assigned functions would present a nice question. However, if the matter is analyzed in terms of the most probable operation of an enacted S. 43, rather than in terms of its formal provisions, it would appear to be unnecessary to reach that question. Again, the key would seem to lie in the observation that compliance with an enacted bill and its effectuation is wholly within Congress' discretion. As noted above, Congress could combine into one numbered section of a bill two or more disparate provisions. It can avoid the intended operation of S. 43 by ensuring that the President may not pick and choose among the items with which it is most concerned.

Of course, Congress may also put in differently numbered sections various items which it wishes to be enacted together and the President may choose to frustrate congressional wishes. In that event, the intent of S. 43 would be effectuated and the power shift would occur. But Congress could accomplish that very same shift by in fact passing separate bills containing the various provisions which it otherwise would put into the same bill. The power shift would occur, but would anyone suggest that Congress could not cause that power shift in this way? If the one would be valid, would not rejection of the other be adherence to pure formalism?

The key would seem to be that congressional discretion, congressional power, to bring about a particular result or to avoid a particular result is preserved.

To conclude, two questions are raised about S. 43 in terms of the Constitution. First, would the bill in operation violate the lawmaking procedure set out in Article I because the separated bills would not be passed again by both Houses? Bills that in fact were not passed through ordinary lawmaking would be sent to the President. While it is literally true that S. 43 would achieve this result, it is arguable that Congress' power to prescribe its own rules and its control over the features of the one original bill would militate against a finding that literal noncompliance effectuated a constitutinal violation. Second, would enactment of S. 43 result in an unconstitutional shift of power between Congress and the President? While this shift might occur, the degree to which it would and the power to reverse the shift would continue to remain with Congress. In that fact would probably lie the basis to reject the argument as too formalistic.

## CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, AMERICAN LAW DIVISION

### CONSTITUTIONALITY OF EMPOWERING ITEM VETO BY LEGISLATION

(By Johnny H. Killian, Senior Specialist)

In response to your inquiry with regard to whether Congress could statutorily confer upon the President the power to veto items in or portions of bills, rather than the entire bill, we submit the following.

Renewed interest in the item veto has stirred with the introduction of both a constitutional amendment proposal and legislation, and it is reported that the President may request authority by statute in the coming session. This response must necessarily be tentative, inasmuch as the form and details of any statutory item veto are still to be developed. While the issue of constitutionality may be addressed at the level of generality concerned solely with power to do something, the question may sometimes be complicated by the manner in which a proposal is drafted.

Under the Constitution, the President appears to have only two choices when presented with a bill: approve it in its entirety or disapprove it in its entirety. The item veto would present him the opportunity selectively to approve and disapprove provisions within the same bill. Generally, the proposals of item vetoes have been directed to appropriations bills or to certain types of appropriations and usually have excluded legislative provisions of such bills; however, it has been proposed from time to time to empower the President with respect to any bill coming before him. The discussion herein specifically deals with appropriations bills, but in most respects the issue it addresses should not turn on the distinction.

*The Veto Power.*—Under Article I, § 7, cl. 2, "[e]very Bill . . . shall, before it becomes a law, be presented to the President of the United States: If he approves he shall sign it, but if not he shall return it . . ." Congress is authorized by two-thirds vote of each House to override the President's objection and to enact the bill into law.

No evidence may be gleaned from the records of the Convention that any of the Framers conceived of the possibility of an item veto, C. Zinn, The Veto Power of the President (Washington: House Judiciary Committee Print, 1951), 33; E. Mason, The Veto Power (Boston: 1890), 20-23, but the Framers were concerned in one respect that Congress might try to evade the veto clause by designating a measure having legislative import as something other than a bill. The result of this concern was clause 3 of the same section which provides that "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." See 2 M. Farrand, Records of the Federal Convention of 1787 (New Haven: Rev. ed. 1937), 301-302, 304-305.

Obviously, if literally construed, the clause could have bogged down the intermediate stages of the legislative process. On the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the clause had been interpreted over the years and it is now interpreted in the same manner. S. Rept. No. 1335, 54th Congress, 2d sess. See also 4 A. Hinds' Precedents of the House of Representatives (Washington: 1970), § 3483. Briefly, it was shown that the word "necessary" in the clause had come to refer to the necessity required by the Constitution of law-making; that is, any "order, resolution, or vote" if it is to have the force of law must be submitted. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President nor must resolutions passed by the Houses concurrently, expressing merely the views of Congress.

*The Item Veto.*—Before the Civil War, Congress began the practice of attaching legislative riders to appropriations bills, thus imposing upon the President the choice of submitting to directives which he opposed or of vetoing needed money bills. See 7 J. Richardson, Messages and Papers of the Presidents, 1789-1897 (Washington: 1898), 532 (Veto message of President Hayes addressing and protesting the practice); Zinn, op. cit., 33. President Grant proposed to the 43rd Congress a constitutional amendment "to authorize the Executive to approve of so much of any measure passing the two Houses of Congress as his judgment may dictate, without approving the whole, the disapproved portion or portions to be subject to the same rules as now." 7 Richardson, op. cit., 242. Presidents Hayes and Arthur recommended similar measures limited to appropriations bills. Id., 538; 8 Richardson, op. cit., 138. Introduced as early as 1876, proposed constitutional amendments containing an item veto have received extremely limited attention in Congress, having been only once favorably reported by the Senate Judiciary Committee, in 1884, S. Res. 18, 48th Congress; 15 Cong. Rec. 3164 (1884), but not being considered by the Senate. A vote the year earlier to discharge the House Judiciary Committee of a proposal failed ot obtain a two-thirds majority, 14 Cong. Rec. 3611. Since that time, Presidents Franklin D. Roosevelt, Harry Truman, and Dwight Eisenhower have made similar recommendations. Ross & Schwengel, "An Item Veto For the President?" 12 Pres. Studies Q. 66, 72 (1982). President Taft, after leaving office, expressed views in opposition. W. Taft, The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations (New York: 1916), 20. For the most extensive hearing, see "Item Veto," Hearing before Subcommittee No. 3, House Judiciary Committee, 85th Congress, 1st sess. (1957). Constitutional amendments were introduced into the 98th Congress, see S. J. Res. 26 and S. J. Res. 128, but no action was taken. See Cong. Res. (daily ed.), Oct. 29, 1983, S14934-S14949 (Senate debated and defeated "sense of the Senate" resolution to effect that item veto constitutional amendment should be proposed).

Failure of constitutional amendment proposals resulted in attempts to achieve the same end through legislation. In 1938, at the request of the Chairman of the House Appropriations Committee, the Chairman of the House Judiciary Committee, Hatton W. Sumners, studied the question of the constitutionality of an item veto through ordinary legislation and advised that he thought the power existed in Congress to enact a bill. 83 Cong. Rec. Append. 200 (1938) (Copy attached). The House attached to the Independent Offices Appropriations Bill for 1939 the Woodrum amendment, which provided, in part: "The President is authorized to eliminate or reduce by Executive order, in whole or in part, any appropriation or appropriations made by this act, or any act or joint resolution, whenever, after investigation, he shall find and declare that such action will aid in balancing the Budget or in reducing the public debt, and that the public interest will be served thereby: Provided, That whenever the President issues an Executive order under the provisions of this section, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiraton of 60 calendar days after such transmission, unless the Congress shall by law provide for an earlier effective date of such Executive order . . ." 83 Cong. Rec. 355 (1938). The Senate bill contained no like provision and in conference the section was not adopted.

It will be noted, first, that the provision contained no authority for Congress to overturn the President's action, save, of course, through enactment of new legislation, and, second, that the measure partakes more of the rescission-deferral authority contained in the Impoundment Control Act, 88 Stat. 332 (1974), 2 U.S.C. §§ 681-688, than of the item veto.

Thereafter, legislation was periodically introduced. The first was apparently S. 2161, 81st Congress, which authorized the President to strike out all or part of items of appropriations which he deemed "not in the public interest." Congress was empowered to reappropriate stricken items by simple majority vote, which the President could not thereafter withhold. Senator Humphrey in 1952 introduced S. 2602, 82d Congress, providing for modification of the rules of the Senate and House of Representatives to authorize a presidential item veto of appropriations, subject to an override by two-thirds vote of both Houses. See also S. 1006, 83d Congress, and S. 1902, 84th Congress. In the 86th Congress, S. 2373 was introduced, modeled after the 1938 Woodrum amendment. See "Impoundment of Appropriated Funds by the President," Joint Hearings before the Ad Hoc Subcommittee on Impoundment of Funds of the Senate Government Operations Committee and the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 93d Congress, 1st Sess. (1973) 111-112 (GAO memo). In the 98th Congress, Senator Mattingly introduced S. 1921, which would have authorized the President to disapprove of appropriation in any act or joint resolution, except appropriations for the legislative or judicial branch.

*The Constitutional Setting.*—Resolution of the question whether a statutory item veto may be created requires an appreciation of the concept of separation of powers. It is, of course, basic learning under our constitutional theory that the Constitution separated national governmental powers into tripartite divisions, E.g., ***Wayman*** v. ***Southard,*** 10 Wheat. (23 U.S.) 1, 46 (1825); ***INS*** v. ***Chadha,*** 103 S. Ct. 2764, 2784 (1983). While there are opinions of the Supreme Court that ascribe to this scheme of division a rigidity which in fact it does not have, ***Kilbourn*** v. ***Thompson,*** 103 U.S. 168, 190-191 (1881); and see ***Myers*** v. ***United States,*** 272 U.S. 52 (1926), modified by ***Humphrey's Executor*** v. ***United States,*** 295 U.S. 602 (1935), and ***Wiener*** v. ***United States,*** 372 U.S. 349 (1958), the Court has cautioned that the Framers did not contemplate a "hermetic sealing off of the three branches of Government from one another [because this] would preclude the establishment of a Nation capable of governing itself effectively," *Buckley* v. *Valeo,* 424 U.S. 1, 121 (1976). Modern cases reject the formalism of Kilbourn and Myers in favor of "the more pragmatic, flexible approach" of Madison and Story, *Nixon,* v. *Administrator of General Services,* 433 U.S. 425, 442 (1977), who in essence argued against a separatist position admitting or no interdependence among the branches; instead, the maxim of separation was to be taken in a limited sense, recognizing the partial agency of each in the others. *United States* v. *Nixon,* 418 U.S. 638, 707 (1974). The standard of interpretation recurred to is that of Justice Jackson, concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635 (1952), who wrote: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed power into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." See *Nixon* v. *Administrator of General Services, supra,* 443; *Nixon* v. *Fitzgerald,* 457 U.S. 731, 753-754 (1982).

A primary function of this form of separation is the maintenance of the system of checks and balances contemplated by the Framers. The Federalist, Nos. 47-51 (Madison). Briefly, the theory is that a paper separation of the branches is insufficient to keep power from flowing to one or another; rather, each of the branches must be given the means and the desire to resist encroachment from the others. Among the means is a limited sharing of functions. For example, the Senate shares in the President's executive power of appointment through its power of advice and consent; Congress shares foreign and military powers with the President as Commander in Chief. More to the point, the President shares in the legislative power through his power to veto, by which he may resist legislative encroachment upon himself and further his conceptions of public policy. *INS* v. *Chadra, supra,* 2782-2783; *La Abra Mining Co.* v. *United States,* 175 U.S. 423, 453 (1899).

Obviously, enunciation of general principles does not resolve specific disputes. Yet, beginning with these general principles, the Court has established rules of interpretation when separation of powers challenges are raised with respect to the actions of one branch or another. The principle of separation may be embodied in a specific clause of the Constitution; there may be a textual commitment of a function to one branch. The appointments clause at the foundation of *Buckley* v. *Valeo, supra,* and the presentation clause at the focus of *INS* v. *Chadha, supra,* represent this stand of separation of powers decisionmaking. Even with regard to specific provisions, however, one must carefully evaluate, first, the blending of the branches by a constitutionally sanctioned participating role, and, second, function as an aspect of application of the clause in issue, inasmuch as it is the nature of the function that ultimately determines where it must be lodged and how ambiguities in clauses must be resolved. *INS* v. *Chadha, supra,* 2784-2788; *Buckley* v. *Valeo, supra,* 124-127, 137-141.

In the absence of a specific clause, the Court must, in determining whether a function may be performed by one branch, derive from context and structure whether that function is inherently exclusively within that or another branch or whether it must be deemed to be exclusively committed to a particular branch in order to protect functions that are exclusive to that branch. Illustrative of this stand of separation of powers decisionmaking are the decisions respecting the removal powers of the President, *Myers* v. *United States, supra; Humphrey's Executor* v. *United States, supra; Weiner* v. *United States, supra,* and those respecting the confidentiality of presidential papers and conversations. *United States* v. *Nixon, supra; Nixon* v. *Administrator of General Services, supra.*

*The Appointments Controversy as a Paradigm.*—To anchor these general principles to a solid issue, it will be useful to briefly review *Buckley* v. *Valeo, supra.* There, Congress had created the Federal Election Commission to oversee the presidential and congressional election process. The Commission was composed of six voting members, two appointed by the President, two by the President pro tempore of the Senate, and two by the Speaker of the House of Representatives, with all six subject to the advice and consent of both Houses. Under the appointments clause, Article II, § 2, cl. 2, the President is empowered to appoint, among others. "Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." The clause gives Congress the discretion in creating the offices to leave the appointments in the President with the advice and consent of the Senate or to consider them "Inferior Officers" whose appointments it may lodge in the President alone, in the courts, or in the heads of departments.

On its face, the clause creates two and only two means of appointing officers of the United States. But who are officers of the United States? Congress has legislative power to regulate the electoral process and each House has exclusive power to judge the election returns of its Members. Moreover, the necessary and proper clause, Article I, § 8, cl. 18, vests in Congress the discretion to make laws to carry out the powers vested in it and other entities by the Constitution. Might it not be that Congress could create such a body outside the framework of the appointments clause?

The Court first determined that officers of the United States were those "appointees exercising significant authority pursuant to the laws of the United States." Id., 126. It then examined the powers Congress had given the Commission. Some of the powers, investigation, receipt of information, dissemination, were of the kind that Congress itself exercised and a Commission as so constituted could be given those powers in lieu of Congress. But other powers were executive in nature and did constitute "significant authority" exercised "pursuant to the laws of the United States." Thus, the power to enforce law through the courts was purely executive; the powers to make rules, dispense appropriated funds, issue advisory opinions, and the like, while thay could be given to an agency somewhat removed from presidential control, were necessarily executive and must be exercised by officers of the United States.

Therefore, once the functions performed were analyzed and fixed in terms of necessary location, the Court could determine whether the appointments clause specified an exclusive approach. With regard to officers of the United States and the types of functions they could carry out, it did; of course, Congress could provide other means of appointments for officers who were not constitutionally officers of the United States.

*The Legislative Veto.*—Similarly, when in *INS.* v. *Chadha, supra,* the Court was faced with the question of the constitutionality of the legislative veto, it analyzed the power being exercised and the entity exercising it in the same context. Because Congress by statute had delegated certain powers to the executive and the executive had implemented the powers, thus creating a legal status, the Court determined that in order to alter this legal status Congress must take steps that comported with the constitutional means for changing law, the enactment of another law by methods which complied with the presentation clause, Article I, § 7, cl. 2, and which had been acted upon by both Houses in line with the bicameralism required by Article I, § 1.

What emerges from examination of the appointments clause and the presentation clause as applied by the Court is the principle that, once it has determined that a function or power is wholly or predominantly one vested in a particular branch, the Court will closely scrutinize any effort to vest that function or power, or a like or similar function or power, elsewhere. In particular, there seems to emerge from the opinions in these cases and others almost a presumption against enlargement of the participation by a competing branch in the performance of that function or power beyond what the Constitution itself requires as a blending. See *INS.* v. *Chadha, supra,* 2784.

*Balancing in a Separation of Powers Context.*—In the absence of a specific constitutional provision and sometimes as a guide in interpreting provisions, the Court, when called upon to determine whether one branch has impermissibly intruded into the province of another, will look to a two-stage rule of thumb. It first asks whether the action of the moving branch threatens to prevent another "from accomplishing its constitutionally assigned functions," and, second, where there is a "potential for disruption" it determines "whether that impact is justified by the overriding need to promote objectives within the constitutional power" of the moving branch. *Nixon* v. *Adminstrator of General Services, supra,* 442–443; *Nixon* v. *Fitzgerald, supra,* 753–754.

*The Item Veto by Statute.*—We are now enabled to evaluate the questions which the Constitution would require to be raised and answered in the face of any proposal to implement an item veto through statutory means. Two means by which such a proposal could be accomplished can be suggested and each would raise somewhat different problems on its own. But before attending to the two alternatives, general commentary is in order.

As we have noted above, the veto is considered a legislative power, which the President may exercise only because the Constitution, because of a confluence of reasons of the Framers, devolves upon him. Any proposal, therefore, which would bestow upon the President the power of the item veto would necessarily enlarge his legislative powers. This would constitute a not inconsiderable strengthening of the President's powers. At present, the bicameral form of law making and the committee system which both Houses of Congress have imposed on themselves join to present a significant barrier to successful enactment of legislation. The President's power to veto the final product and require a two-thirds vote of both Houses to override is another heavy burden to bear, but the President's exercise of it comes attend-ed with costs. At present, he has two choices: sign a bill or retrun it. If a bill contains both provisions he wants and perhaps requires any provisions he does not want, his discretion to return it may be substantially burdened and curbed, and Congress may multiply his concerns by sending him omnibus bills or bills combining several features. If he could choose which part of a bill sign and which part to return, his discretion would be considerably enlarged and Congress' recourse similarly limited. It must be noted that what we are discussing is not the policy of the item veto but the degree to which it would alter power balances between the two branches.

Two constitutional objections could be made, in tandem, to this alteration.

First, the Constitution in Article I is quite detailed with respect to the mechanics of law making. It must be accomplished through the cooperation of the two Houses. All bills for raising revenues must originate in the House of Representatives. Each House is responsible for making its own rules of procedure. And at the conclusion of the process, bills must be presented to the President. It may be argued that, just as the appointments clause provided the exclusive means by which officers of the United States, properly defined, could be selected, the legislative process laid out through Article I constitutes the sole and exclusive, and undeviating, means of enacting laws. Just as, to continue, the Congress has a limited role with respect to executive offices in creating them and the Senate similarly in advising and consenting to appointees, so the President's role in the legislative process, his formally coercive role rather than his influence, is expressly limited to saying "Aye" or "Nay" at the conclusion. The Constitution, it may be said, provides him a choice of taking or leaving the entire product.

Thus, the argument is that the constitutional text provides a limited legislative role for the President; that role cannot be enlarged without violating the text.

Second, to so enlarge the legislative role of the President in the process of enacting legislation is to create a "potential for disruption" of the legislative process. Whatever one may think of the spirit of compromise in the legislative process, the give and take, the combining of disparate proposals in the interest of combatting strength with strength, the inclusion within a measure of one thing desired by congress with another desired by the President, no one would contend either that it is not constitutional or that it is not the way legislative bodies have always functioned. The item veto would weigh the scales differently, would significantly alter how Congress legislates, would draw a different balance in how Congress performs its constitutionally assigned functions.

Consciously, the Framers included several curbs to impermissible executive coercion of the lawmaking process. Members of Congress were protected in their speech or debate and given immunity from criminal arrest. Article I, § 6, cl. 1. They were barred from appointment to civil offices which had been created or the emoluments of which had been increased during their terms of office, and they were barred from holding both congressional and executive office simultaneously. Article I, § 6, cl. 2. The Item veto, it may be contended, would give the President power over the legislative process that could well alter both institutions in great measure.

The Court has formulated a balancing test for assessing whether the potential for disruption is too great. It requires, as stated above, a determination whether the impact is justified by the overriding need to promote objectives within the constitutional powers of Congress and the President. This determination would require consideration of the degree of impact, of the objectives and the necessity to promote then, and of less severe alternatives. In the absence of a concrete proposal, we would at this point forego undertaking that consideration.

It may be objected that, while congressional incursions into the executive branch, as found by the Court in Buckley and Chadha, or into the judicial branch as found by the Court in *United States* v. *Will*, 449 U.S. 200 (1980), may require judicial policing, a congressional enactment that limits its own powers, such as is here posited of the item veto, necessitates no judicial review or at most one of the most relaxed scrutiny, inasmuch as it would be through Congress' own actions that it gave up power. For two reasons, however, this objection is not well taken.

First, the Court has held impermissible the suggestion that the President by signing legislation which intrudes into his province has waived his right to object to the legislation. *INS* v. *Chadha, supra*, 2779 n. 13; see also *Buckley* v. *Valeo, supra*. No reason appears why a different rule should prevail with respect to Congress.

Second, and more important, the values and functions of the separation of powers are not primarily for the benefit of each branch or of its temporary occupants. The purpose of separation is the protection and preservation of individual liberty, because the Framers perceived that liberty would not be safe in a government in which one individual or one group of individuals made the laws, executed the laws, and judged allegations of violation of the laws. The Federalist, Nos. 47, 48 (Madison). It is usually not the branch intruded upon which raises the constitutional issue in court but a private party who has suffered an injury thereby. Chadha is a prime example, as are the moving parties in Buckley, Myers, Humphrey's Executor, and Weiner.

Illustrative of both reasons is judicial handling of the nondelegation doctrine. Under this doctrine, the courts have over the years attempted to mark out the boundaries of the permissible degree of delegation of legislative power to the executive and judiial branches. While in only two instances have delegations been found unconstitutional, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), the doctrine continues to figure prominently in constitutional law, e.g., *National Cable Television* v. *United States*, 415 U.S. 336 (1974), and see *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U.S. 607, 671 (1980) (Justice Rehnquist concurring), and *American Textile Mfgrs. Institute* v. *Donovan*, 452 U.S. 490, 543 (1981) (Justice Rehnquist dissenting), making clear that at some point it is unconstitutional for Congress to give up its powers.

*Item Veto by Delegation.*—It may be suggested that Congress could simply delegate the President the power to veto items in appropriations bills or in general bills. The model would presumably be the Impoundment Control Act, 88 Stat. 332 (1974), 2 U.S.C. §§681-688, under which the President either defers or rescinds certain items of appropriations and Congress responds accordingly. While the scholars and the courts are in disagreement whether the Act itself delegates authority to the President or whether it provides the means by which the Congress responds to presidential exercises of authority under other legislation, the appropriateness of the Act as a model for the item veto is questionable for a very fundamental reason. Delegation of legislative authority is always made to the President or to some other executive branch officer (or to a judicial officer) in the context of the execution of the law. In other words, Congress has passed a law which authorizes the exercise of some power and some officer must execute it. The President may raise or lower tariffs, *Field* v. *Clark*, 143 U.S. 649 (1892); *J.W. Hampton & Co.* v. *United States*, 276 U.S. 394 (1928), the price of agricultural commodities may be fixed, *United States* v. *Rock Royal Co-operatives*, 307 U.S. 533 (1939), or excess profits may be recovered in war time. *Lichter* v. *United States*, 334 U.S. 742 (1948). Whatever the action being taken, it is in the context of the execution of an enacted statute.

The attempted delegation to the President of an item veto would not involve his executive functions; it would rather enlarge his legislative responsibilities, his power to participate in the legislative process. As such it woujld be subject to the objections set out above to a general enlargement of those legislative powers and it would not be subject to the counter arguments that successful delegations of legislative power to the executive could supply. In other words, the Impoundment Control Act is not a precedent and neither is the host of cases in the Supreme Court sustaining past delegations. To say this is not to say that conferral of the item veto cannot be sustained, but it is to say that it must surmount the arguments made above without the favorable weight of the delegation precedents.

*Congressional Definition of "Bill".*—The second method by which Congress might statutorily confer the item veto on the President was suggested by Congressman Sumners in his opinion for the House Judiciary Committee in 1938, already referred to. The Congressman focused upon the word "Bill" in Article I, §7, cl. 2, prescribing the President's veto power. "Does the word 'bill' necessarily mean all the separate items assembled under one caption, each of which might have been the subject matter of a separate bill but which for convenience sake in expediting the public's business are assembled under one caption? . . .

"To hold that the word 'bill' necessarily means all the items assembled under one caption would be a construction operative against the purpose and plan of the Constitution. That construction would compel the President officially to approve items which he does not in fact approve in order to avoid striking down other items which he does approve. On the other hand, such a construction would force him to disapprove items which in fact he does approve in order to reach other items which he disapproves. If, however, Congress draws an appropriation bill so that without doing hurt to the effectiveness of legislation the President is permitted to disapprove separate items and approve the remainder, permitting those items which have been agreed to by the House of Congress and approved by the President to become law, that would be in harmony with the plan and purpose of the Constitution. . . .

"It would be necessary, as I view it, before the President would be authorized to veto a separate item in an appropriation bill, for the Houses of Congress by appropriate resolution to indicate to the President that they have drawn the bill so that each item may be regarded as a separate bill for the purpose of his examination and approval or disapproval, and that it is the will of Congress that the bill be thus examined and acted upon." 83 Cong. Rec. Append. 200, 201 (1938). For similar arguments, see Zinn, op. cit., 34-35; "Item Veto" Hearings, op. cit., 49-54 (Congressman Stewart Udall), 54-55 (Congressman Multer).

Central to this argument is the proposition that when the Framers drew up the veto clause, they assumed the word "bill" meant "a legislative instrument setting forth one or more propositions of law, all related, however, to a single subject matter." Zinn, op. cit., 34. We may infer that the Framers "did not foresee omnibus bills and legislative riders to appropriations bills." *Ibid.* The practice of attaching riders to appropriations bills and other measures apparently began in 1820, when a bill for the admission of Missouri was attached to a bill for the admission of Maine, and apparently proliferated during and after the Civil War. Mason, op. cit., 48 n. 1. Germaneness rules and the constitutional requirement in some States that a bill's title correctly state the single import of the bill are attempts to halt the practice.

However much truth may be to these contentions, however, it is difficult to see where they advance any argument. Whatever the Framers may have thought the word "bill" to encompass in 1787, they neither expressly nor implicitly constitutionalized any version of the meaning. The word, insofar as it has meaning within the intendment of the Constitution, is what Congress, each House being authorized under Article I, § 5, cl. 2, to determine the rules of its proceedings, considers a bill to be and what it sends to the President. When, after all, the Framers were concerned about the evasion of the presentation clause, they inserted the specific provisions of clause 3 of § 7, so as to include the submission of everything that would have the force of law to the President, focusing on inclusion rather than division. The most extreme meaning to be attached to this argument is that the President now has the power of item veto because Congress has exceeded what the Framers intended.

Important it is to notice, however, that the item veto is to be asserted whether in constitutional amendment form or in statutory form, not only against riders on appropriations bills or other bills or against nongermane provisions of bills, but as well against any provision of a bill. Inasmuch as appropriations bills appear to be the focus of most of the consideration of the item veto question, it is well to note that most appropriations bills now, and in the recent past, have been department-wide and in most cases multi-department bills. In the early days, appropriations bills started out as lump-sum appropriations for the entire government in one bill usually consisting of a single paragraph. E.g., 1 Stat. 190 (1971); 1 Stat. 104 (1790); 1 Stat. 95 (1789). There then developed itemization of appropriations in extreme specificity. Abascal & Kramer, "Presidential Impoundment, Part I: Historical Genesis and Constitutional Framework," 62 Geo. L. J. 1549, 1578-1583 (1974). The lesson one draws from the history with respect to the content of bills in the early days is problematical.

Again, to say all this is not to say that Congress may not define the word "bill" so as to make it possible for the President to veto separate parts. But it is to say that one can draw little support from the meaning of the word in the Framer's day or in the first congressional practice and its growth. To enact such a provision raises the same constitutional objections we set out above and requires the same kind of analysis in terms of the express provisions of the veto clause and the implicit constraints upon enlargement of the President's legislative role.

At a more mundane level, it may also be suggested that to adopt this approach would probably have little practical effect upon lawmaking and the President's veto, should Congress continue to follow the course it has followed over much of our history. This thought emerges from a consideration of what Congress would be doing, should it define "bill" for purposes of the veto clause. It could enact legislation or it could amend its rules. Either way, of course, it is prescribing a rule to govern its internal procedures, to govern how the legislation it passes is to be treated for purposes of presentation to the President. But whether embodied in its rules or in legislation, the procedures of Congress are always subject to alteration by that Congress or a future one without formal repeal of the provision. See 88 Stat. 331, § 904(a)(2), U.S.C. § 621 note (reservation and understanding of power to alter rules embodied in statute at any time). For example, although both Houses of Congress have rules against legislation on appropriations bills (and although the Supreme Court entertains a presumption against finding repeals or alterations of substantive law in appropriations measures), *Minis* v. *United States* 15 Pet. (40 U.S.) 423, 445 (1841); *TVA* v. *Hill,* 437 U.S. 153, 190-191 (1978), "[t]here can be no doubt that . . . [Congress] could accomplish its purpose by an amendment to an appropriations bill . . . ." *United States* v. *Dickerson,* 310 U.S. 554, 555 (1940). "The whole question depends on the intention of Congress as expressed in the statutes." *United States* v. *Mitchell,* 109 US. 146, 150 (1883). See also *United States* v. *Will, supra,* 221-222. In other words, if Congress disregards a rule, the courts will enforce the results; a law is no less a law because a self-limitation was dispensed with. Of course, such a rule may give rise to a point of order during consideration, but that too is subject to a majority override.

It will be noticed upon a close reading of Congresssman Sumners' opinion that he accepts all this. Immediately upon the sentence last quoted above to the effect that Congress should specify which parts of a bill the President may consider separately and which not, he adds: "Otherwise, we would have a situation under which the President could cut away parts of a bill, leaving as the law an incomplete item of legislation which the House of Congress would not approved in that form as an original proposition. The Houses of Congress must have control over legislative processes in order that the people may hold them to full responsibility for the results of legislative processes." Obviously, if Congress is in full control, it could pass as separate bills the items which it did not wish to have considered together. Usually, however, for one reason or another, it wants disparate items considered together.

Additionally, it may be noticed that as so construed, the Woodrum amendment, quoted above, was not in line with the Sumners' opinion on the constitutional form of an item veto and, as noted above, seems not to have been an item veto at all.

Thus, it appears that achieving an item veto by redefining the word "bill" would, if effectual, be subject to the same constitutional arguments that could be made against any statutory item veto. On the other hand, because of its susceptibility to total congressional control, it may well be a wholly ineffectual way of reaching an item veto result.

*Conclusion.*—To enact an item veto by statute requires that Congress confront fundamental questions of separation of powers. While the branches are not tightly sealed off from each other, they are presumptively retricted to the excercise of their respective functions, save to the extent that the Constitution itself melds them, as in the creation of a legislative role for President through the veto. The precedents seem to indicate a Supreme Court hesitancy to find an enlargement of the role of one branch in another beyond that expressly provided, the Chadha legislative veto decision being only the latest example.

If this reading be the correct one, a statutory item veto would face a substantial textual barrier in view of the wording of the two clauses governing presentment. An item veto would enlarge the President's legislative role. Moreover, enlargement of that role would appear to raise the balancing standard of a potential disruption of the functions of Congress, necessitating a close scrutiny of the justifications for it. Both methods of accomplishing a statutory item veto are subject to these constitutional arguments. Each additionally may raise problems unique to each, the delegation alternative being the unusual nature of the delegation outside the execution of the laws and the definitional approach being the lack of historical support for the view that the Farmers considered a "bill" to be anything other than what Congress chose to place in one document. Further, the definitional approach raises questions of efficacy.

Finally, none of the foregoing is addressed to the policy issues surrounding the desirability of the item veto. The possible consequences of its institution were touched on occasionally to develop a constitutional argument. But, as the Court observed in *INS.* v. *Chadha, supra,* 2780-2781, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." Neither, it may be added, would the view that a measure would be inefficient, inconvenient, or harmful justify the raising of constitutional objections in the absence of plausible grounds. Thus, the foregoing limits itself strictly to an attempt to understand and to apply the often amorphous standards of the separation of powers doctrine.

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[From the Presidential Studies Quartely]

## THE ITEM VETO: WOULD THE FOUNDERS APPROVE?

(by Judith A. Best)

The principle of constitutional reform in this country has always been "Reform that you may preserve." Lord Macaulay's advice is particularly apt with regard to the item veto for the President, a constitutional reform that has been on the national agenda for over 100 years. When reforms of constitutional magnitude are considered, factors or expediency, or practicality, of the felt needs of time and place must be buttressed by analysis of the Founder's intentions. The intention of the Founders is the hallmark of political respectability in this country.

As once again the call goes out in favor of the item veto, we must ask, what would the Founders say about an item veto for the President? There is no evidence that the subject was considered at the Constitutional Convention. There is no reference to an item veto in the most authoritative analysis of the Constitution, The Federalist Papers. This being the case, how can we ascertain the Founders' views on the proposal for an item veto? Our constitution is a balanced system, an arrangement of various elements into an organic whole. In such a system, each part has a function, and the whole is dependent upon the proper functioning of the parts. The veto is one of these elements, and, therefore, we must determine what role function the Founders assigned to the veto in the constitutional system. Then, we must discover whether the veto performs that role and function today, or whether the veto has been warped and weakend so that it malfunctions. If the latter, it follows that the Founders would approve of a reform that would restore the veto, to its proper function. Analysis of the purposes of the qualified veto, of the Founders' arguments for it and against the absolute veto, indicates that, were they with us today, the Founders would favor the item veto.

The Convention addressed four issues with regard to the veto: 1. whether there should be a veto provision; 2. whether the executive should exercise the veto alone or share it perhaps with a judicial council of revision 3. whether the veto should be absolute or qualified; and 4. if a qualified veto, whether the appropriate vote for a legislative override should be three-fourths or two-thirds.[1] For the members of the Convention, the veto power was merely one facet of a larger question, the separation of the powers of government by function. It was generally agreed that one of the major weaknesses of the Articles of Confederation was the lack of a clearly defined executive. Under the Articles, the executive functions were performed by Committees of Congress. The Convention was overwhelmingly agreed on the principle of the separation of powers, and even the New Jersey Plan provided for it in embryonic form. The acceptance of the principle meant that the debate focused on matters of implementation such as, what should be the powers granted to the executive and how should he be selected? Provision for a shared veto was part of the Virginia Plan. The delegates soon recognized, however, that if the separation of powers principle was to work, the executive had to be independent of the other two branches of government. Independence being desirable and necessary, the Convention ultimately gave the President alone the veto power.

In The Federalist Papers, Madison and Hamilton discussed two issues, the purposes of the veto and the advantages of a qualified veto over an absolute veto. According to Hamilton, the veto has two functions, "it not only serves as a shield to the executive, but furnishes additional security against the enactment of improper laws."[2] Madison addressed the first function in Federalist 51 following his famous assertion that "the great security against concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[3] He sees the veto as a device to fortify the executive against legislative assaults on the separation of powers.[4] Bicameralism is not a sufficient check on the power of the legislature of a republican government. The inherent weakness of a republican executive means that he must be "armed" for defense, and the veto is the "necessary constitutional means," the constitutional armor. Hamilton repeats the point in Federalist 66 and 73, and both men use the words arm and defend. It is Hamilton who discusses at length the second, but not secondary, function, to prevent "the passing of bad laws, through haste, inadevertence, or design"[5] Hamilton observes the reconsideration is a key to good laws. "The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest."[6] Because the veto is qualified, because it can be overridden, the veto is, in part, an opportunity to reconsider.

This observation regarding reconsideration is central to the Founders' political theory, to their concept of the nature of man and what is required to produce the common good. As Martin Diamond so convincingly argues, the Founders were neither simple, naive optimists nor Hobbesian pessimists about the nature of man.[7] In their view the nature of man is complex, and they drew on both the ancient and modern conceptions of man in formulating their own. With Machiavelli, Hobbes and Locke, they agreed that man is primarily selfish and self-interested. With Aristotle, they agreed that man is also a social animal, capable of a concern for the common good, capable of practising the civic virtues. Since the selfish passions dominate the social attributes, it is essential that the contest between them be handicapped. Thus, prudent framers of republican governments should adopt the "policy of supplying, by opposite and rival interests, the defect of better motives."[8] The Founders were sober, cautious optimists; according to Madison, they believed that there is "sufficient virtue among men for self-government," if and only if their political institutions are properly constructed.[9]

Properly constructed political institutions, like judo, employ the opponent's own strength against him. In a contest between the selfish passions and the social attributes the latter will lose. The match is unequal. The contest must be between and among the selfish passions. Thus Madison, in discussing the fundamental policy, uses the adjective "rival". A rival is not only a competitor but a competitor who is equal or nearly equal in some respect. A contest between rival interests is a contest likely to produce a tie, at least a temporary stalement. With the selfish passions stalled, the social attributes stir. Properly constructed political institutions provide the opportunity for reconsideration and reassessment, for the second-thought and the afterthought.

Dividing power, setting ambition against ambition, interest against interest, department against department, delays action, restrains the passions, institutionalizes reexamination, provides time for reflection, in the phrase, releases the social attributes in man's nature. The Founders' belief in man, their belief in his capacity for self-government is a belief in the rightfulness of his calm, sober, mature thought, a belief in his second-thought. The people may indeed be trusted when they are sober but not when they are drunk with passion and power. Men may not be angels, but there are "qualities in human nature which justify a certain portion of esteem and confidence", and which will come to the fore if men can be restrained from rushing into decisions and indulging their passion.[10]

The veto power, the power "of returning all bills with objections" is essential to the Founders' plan, and the arguments against an absolute veto also illustrate its essentiality. Both Madison and Hamilton argue against an absolute veto and for a qualified veto on the grounds that a qualified veto will be used with more frequency. There are two problems with the absolute veto Hamilton states the general opinion that it is "a power odious in appearance, useless in practice."[11] The absolute veto is a concept anathema to republicans because it implies superior right, wisdom or virtue in a single man. In a word, it is monarchical. The power is so offensive to men in general, says Hamilton, that even the British King hesitates to use it and employs every other resource available to him to avoid a veto and thus the displeasure of his people.[12] If a British King is reluctant to excercise the power, a republican President would be even more so. Hamilton's conclusion is "there would be greater danger of his not using his power when necessary, than of his using it too often or too much."[13]

Hamilton goes on to argue that an absolute veto, though perhaps rarely exercised, is designed to check and defeat extraordinary and extreme legislative offenses, "an immediate attack on the constitutional rights of the executive, or a case in which the public good was evidently and palpably sacrified."[14] He has little doubt that in the obvious case of usurpation or a bold and shameless assault on the people, an executive of ordinary will and courage would exercise the absolute veto. In his judgment, the absolute veto is not useless in "the case for which it is chiefly designed," the worst case scenario, a legislature run amuck. Hamilton had even argued in the Convention for an executive with an absolute veto.[15] Madison, however, had his doubts saying "It would be neither altogether safe nor alone sufficient."[16] The absolute veto is like the death penalty. The death penalty does indeed work; it will stop the person executed from breaking any more laws, but it is too harsh a remedy; it can only be used for the most heinous of crimes and the most dangerous of criminals. Like the death penalty the absolute veto is not a device for the ordinary occasion.

The qualified veto has neither of these two defects. It is not odiously monarchical because it is not based upon the probable wisdom or virtue of the executive but rather upon the possible fallibility of the legislature.[17] It is not based upon the superiority of the one but on the lack of superiority in any and all. It is based upon the wisdom of reconsideration. Indeed, if the assumption of wisdom and virtue in the executive were the principle, then the veto should be absolute and not qualified. The qualified veto is the power "of returning bills with objections for reconsideration," and possible override. There is no point in returning a bill for reconsideration if the executive's judgment is presumed to be better than the legislature's.

Further, returning a bill for reconsideration and possible override is not only a guard against abuse by the executive, it implies a faith in the legislature without which the absolute veto would be justifiable. A legislature so debased and faithless as to propose a patently oppressive or perfidious bill ought not to have an opportunity to reinstate its scheme. The qualified veto is not designed for the worst case. The Founders' predicted legislative "encroachment", gradual intrusion, improper advances on the powers of the executive or the rights of the people. They predicted trespass not treachery. The qualified veto is designed for the ordinary case, for a legislature that intrudes on the other departments, for a legislature guilty of haste or negligence, for a legislature led to error through passion or interest. Their confidence in the legislature is, of course, very cautious and restricted, but it is a confidence nonetheless. Fallibility is common and to be expected, but perfidy is not. Therefore, provision for reconsideration is prudent, and a qualified veto is not only necessary, it is sufficient.

The fact that an override of the objections must be based upon a two-thirds vote of the legislature rather than a simple majority is designed to insure reconsideration. If a simple majority vote the second time sufficed, serious reconsideration would be unlikely. Institutional pride and jealously of legislative prerogative alone might foreclose the possibility. Reconsideration would become a pro forma ritual. The fact that the objections are raised from someone in a different situation and with a different perspective is important enough under the Founders' policy of rivalry to require that the legislature be quite certain that its original position was correct, thus an extraordinary majority. Interestingly, Madison himself opposed the two-thirds override rule and favored a three-fourths rule on the grounds that a two-thirds rule made the veto too weak to accomplish its purposes.[18]

The qualified veto is not only less offensive to the people, it is more likely to be frequently and forcefully used. A republican executive who might (and one would hope should) doubt his moral right to destroy a legislative bill with an absolute veto would have fewer qualms about a veto that could be overriden. The rationality of reconsideration in light of objections is legitimizing. Further, the executive would not stand alone if the veto were sustained since a significant number of legislators would be on record supporting his position. Hamilton, therefore, concludes that qualifying the veto facilitates its use. The qualified veto is more effectual. It is more likely to be a shield to the executive and a security against bad laws. Although the absolute veto appears to be more efficacious than a qualified veto, it is not because it is less likely to be exercised.

The Founders chose a qualified veto because such a veto can be more frequently employed, and they wanted it to be employed. The veto was not simply a device for extremity, the last line of defense of the liberties of the people. The veto was designed to institutionalize legislative reconsideration in light of executive objections. It was designed for the ordinary legislative case. If not a common occurrence, the veto was to be an unexceptional, customary practice. Madison anticipates this when he expresses his concern that an absolute veto will not be used "on ordinary occasions." [19] Hamilton's whole argument in *Federalist 73* is based on a distinction between ordinary and extraordinary occasions. For Hamilton, at least, an absolute veto is appropriate for an extraordinary occasion, for a constitutional crisis, but for the ordinary occasion, for "improper laws", for "errors", the qualified veto is more desirable and effectual because more readily exercised.

To place the argument in its largest context, the Founders believed weak government is a greater danger to the liberties of the people than strong government. Madison argues that the first consideration of founders must be to "enable the government to control the governed." [20] Hamilton argues that "the great and radical vice" of the Confederation was that it had no authority to enforce its own laws on individuals.[21] Weak government is contemptible. It is competence that attaches men to governments. If "vigor in government is essential to the security of liberty," [22] if government must be able to enforce its own laws, the executive must be vigorous because the enforcement of the laws is the function of the executive. The Founders desired a vigorous executive because they desired a competent government, and they saw competent government as a function of an executive with competent powers. "A feeble executive implies a feeble execution of government. A feeble executive is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government." [23] Good government requires an executive with competent powers, an executive independent of the legislature, and the qualified veto is necessary to preserve the independence of the executive.

Strong government may be less of a danger to the liberties of the people than a weak government, but a strong government is potentially dangerous as well. The Founders recognition of this fact, however, did not lead them to conclude that government should be weak. They judged it irrational and absurd to deny great power to government for then it cannot accomplish the great tasks assigned to it. On the other hand, since they knew that all power can be abused, they judged it naive and irresponsible to grant great power to government without the "auxiliary precautions" of "internal controls." Madison, therefore, argues that it is not enough to create a government that can control the governed. It is also essential to "oblige it to control itself." [24] To do this, their political theory informed them, they must adopt the policy of rival interests. Abuse of power is to be prevented by an equilibrium of power, a state of balance between opposing powers. This policy requires not only that government be divided, the separation of powers, but also that each department be given powers both to defend itself and to curb the others, the checks and balances. The checks and balances are essential to the constitutional system. As Hamilton observes, there is no point or purpose to the separation of powers without the checks and balances, without them, "such a separation must be merely nominal, and incapable of producing the ends for which it was established." [25]

No clearer example of the checks and balances is to be found in the Constitution than the veto power. If internal controls are necessary then the executive must have veto power competent to check the legislature. The competence of the veto is more a function of usableness than of rigor. Ironically, the absolute veto was rejected because it would make a republican executive weak and incompetent. The veto is a tool, and a tool must be appropriate to the job. One does not use a blow-torch when a match will do it. The veto is constitutional armor, but one does not send in an army when a squad will do it. An absolute veto is a powerful weapon. It is too powerful for the Founders' purposes. An executive with an absolute veto is a giant, but he is a handcuffed giant. He has a power he cannot use.

What bearing does this have upon the item veto? What would be the Founders' position on the item veto? Since the Founding the legislature has developed practices that often convert the qualified veto into something closely akin to the absolute veto, a device too rigorous to be used as a security against bad laws. The legislature has adopted the practice of adding riders to bills and in particular legislative riders and pork-barrel appropriations to vital bills. It has become a common legislative practice to include under the heading of one bill matters that should clearly be the subject of several separate bills. The legislative riders are most often either unsound or highly controversial items that need to be compromised or reconsidered. The practice is a blatant attempt to finesse the reconsideration process the Founders institutionalized in the veto. In addition, the legislature often includes venal, pork-barrel proposals in appropriations bills. Thus, questionable proposals are attached to bills necessary for the operation of the government. This practice has impaired and diminished the qualified veto significantly. Current legislative practice presents the President with Hobson's Choice, take all of what is offered or nothing. Such proposals have no other purpose than to intimidate the President, to emasculate the veto power, to foreclose the opportunity for reconsideration.

The Founders intended to institutionalize the veto as part of the ordinary lawmaking process. They intended that the President should be consulted and should have the opportunity to exercise his independent judgment. They intended that he could initiate a legislative reconsideration by returning bills with his objections. They intended that no bill should become a law unless in the judgment of a two-thirds vote of both houses of Congress, the President's objections were deemed insufficient or unwarranted. Current legislative practice has made the veto less effectual because less apt to be exercised. When a veto must shut down the whole government because the objectionable provision is attached to a necessary appropriations bill, the veto is "more harsh, and more apt to irritate." It gives the appearance of shooting at flies with a cannon. It forces the President to throw out the baby in order to get rid of the bath water. All or nothing choices are intimidating and are intended to be. An independent President will initiate reconsideration, and intimidated President will not.

The veto was designed not only to provide the benefits of reconsideration but also those of anticipation, the foresight that brings self-control. As Hamilton pointed out, it is not just an actual veto but the anticipation of a veto that will be the check and balance. "When men, engaged in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition from doing what they would with eagerness rush into if no such external impediments were to be feared." [26] The problem is that the legislature has invented techniques that give it less reason to anticipate a veto, thus less reason to be restrained and responsible. The efficacy of the veto depends upon the fact that though the legislature can override the veto, it cannot forestall it except by self-discipline, except by anticipating the executive's objections and responding to them beforehand. The veto is designed to be an incentive for legislative self-control as well as a method of executive control. The veto is also designed to oblige the legislature to control itself.

Current legislative practice subverts thus by providing the legislature with an alternative to self-discipline. The alternative is a form of blackmail, extortion of the executive's approval through threat, the onus of creating and appearing solely responsible for a governmental crisis. Men who anticipate a veto can avoid self-control and put the executive in check through these legislative maneuvers, thus inverting the veto process. The legislative has turned the tables on the executive making the veto work for legislative license instead of against it. It is fair to say that the veto power created by the Founders has been displaced and debilitated, and that some form of item veto would be viewed by the Founders as necessary to reinstate the veto power they originally envisoned. The item veto would restore the lost vigor of the qualified veto for it can be frequently and forcefully used on ordinary occasions. It is reasonable to assert that the Founders would not find the item veto to be dangerous innovation but rather a rehabilitation of an original and essential check and balance.

The practice case for the item veto has been effectively made elsewhere.[27] The sole focus here is on the intentions of the Founders, for they were right: government must be granted sufficient power to accomplish its tasks, but it is unwise and dangerous to grant such power without "internal controls", without the separation of powers and the checks and balances. The qualified veto is a part of the internal balance; it is a counterforce that offsets potential abuse of power by the legislature. Since the founding, the legislature has encroached on the veto power. There can be no doubt that the Founders, seeing the encroachment, would act to restore the balance they deemed necessary to oblige the government to control itself. They, surely, would reform that they might preserve our constitutional system.

### FOOTNOTES

[1] Max Farrand, The Framing of the Constitution of the United States (New Haven.: Yale University Press, 1962).

[2] Federalist 73. Clinton Rossiter, ed., The Federalist Papers (New York Mentor Books, 1961). p. 443.

[3] Federalist 51, pp. 321–322.

[4] Ibid., p. 323.

[5] Federalist 73, p. 443.

[6] Ibid.

[7] Martin Diamond, "The American Idea of Man: The View from the Founding," in Irving Kristol and Paul H. Weaver, eds., The Americans; 1976 (Lexington, Mass.: D.C. Heath, 1976), pp. 1–23.

[8] Federalist 51, p. 322.

[9] Federalist 55, p. 346.

[10] Ibid.

[11] Federalist 73, p. 445.

[12] Federalist 69, p. 416–417 and Federalist 73, p. 444.

[13] Federalist 73, pp. 444–445.

[14] Ibid., p. 445.

[15] Farrand, p. 88.

[16] Federalist 51, p. 323.

[17] Federalist 73, p. 443.

[18] Farrand, pp. 183-184.

[19] Federalist 51, p. 322.

[20] Ibid., p. 322.

[21] Federalist 15, pp. 108–110.

[22] Federalist 1, p. 35.

[23] Federalist 70, p. 432.

[24] Federalist 51, p. 322.

[25] Federalist 71, p. 433.

[26] Federalist 73, p. 446.

[27] Russell M. Ross and Fred Schwengel, "An Item Veto for the President?" Presidential Studies Quarterly, vol. XII, no. 1 (Winter 1982), pp. 66–79.

STATE UNIVERSITY COLLEGE AT CORTLAND,
*Cortland, NY, January 30, 1985.*

Senator MACK MATTINGLY,
*U.S. Senate, Washington, DC.*

DEAR SENATOR MATTINGLY: After a careful examination of your proposal to give the President a two-year statutory line item veto authority over appropriations bills, I write to express my support. It is my considered judgment, as expressed in my article, "The Item Veto: Would The Founders Approve?" Presidential Studies Quarterly, Spring 1984, that the item veto is necessary to restore the balance of power between the legislature and the executive that the Founders deemed essential for good government. Although I would prefer a constitutional amendment, I support this bill as an experiment and a first step for I respect the concerns of those wary of constitutional change. I wholehearted agree that constitutional amendments should not be made lightly and that the burden of proof lies with those proposing constitutional amendments.

In the process of forming my judgment on your proposal, I have reviewed the literature and weighed and considered the several objections to the proposal. I conclude that your proposal meets the raised objections, constitutional, political, practical and ministerial, either fully or on balance. I have considered each of these objections separately and formulated a response, which I have attached. Please feel free to use any of these thoughts you find cogent.

Three simple statements of fact have a bearing on the item veto: 1. The veto was created by the Founders to be an internal control on government. 2. Congress has eroded the veto power. 3. Government spending is out of control. While the item veto is not the only or the sufficient solution to the problem of government spending, it is a solution to the imbalance of power. To be the sufficient solution to the imbalance of power, it would have to take the form of a constitutional amendment. What Congress can give, Congress can take away.

A statutory item veto authority may be justified on practical political grounds, but is must also overcome that objection which has proven fatal to previously made statutory proposals—their unconstitutionality. In my judgment your proposal is constitutional for it does not change the requirement of presentment to the President or the provisions for reconsideration and override, and it is based on the congressional power, implicit in Article I, Section 5, to define a bill.

There are many practical arguments for the item veto, but the compelling argument is constitutional principle. It is fidelity to the separation of powers with its checks and balances. As Hamilton said, in Federalist 71, without the checks and balances, "such a separation must be merely nominal, and incapable of producing the ends for which it was established." The foremost, though not the exclusive, end was to prevent legislative dominance, as is clear from Hamilton's elaboration:

> It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates the fundamental principles of good government; and, whatever may be the forms of the Constitution, unites all power in the same hands. The tendency of the legislative authority to absorb every other has been fully displayed and illustrated. . . . In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity.

Hamilton may not have been foresighted enough to predict the specific means of encroachment, that Congress would abuse its power to define a bill in order to encroach on the veto power, but he did foresee the general tendency. Indeed, on reading his last sentence above, one would think that he had actually overheard the objections to the item veto reform made by a few of our representatives—so aptly does he describe them.

The veto is an indispensable check and balance, and the Founders intended that it be frequently and forcefully used as an essential internal control on government. The Founders saw in the veto the means of providing the benefits of reconsideration and anticipation. Abusing its power to define a bill, Congress has trespassed. Having transgressed, will it rectify? The more cynical analysts may believe that this proposal has the same prospect of passage as the fox locking the chicken coop, but I do not share this view. Political Scientists teach their students that there are two theories of representation: the delegate, who is the faithful representative of his small part of the whole, of the special, narrow, local interests of his particular constitutents, and the trustee, who, knowing that the whole is greater than any of the parts or even their sum, acts for the good of the whole. Which, the students ask, is the model followed by our representatives? The answer, I believe, is both—as the situation requires. On occasion a policy that transcends the clash of special interests and institutional jealousy of power is needed. On such occasions many of our delegate representatives are capable of being trustees. This proposal is such an occasion. It is an opportunity to revitalize one of our constitutional checks and balances; it is an opportunity for statesmanship.

It is possible for our representatives to be statesmen; it is possible because it must be possible if men are capable of self-government. The fundamental policy of "supplying by opposite and rival interests the defect of better motives" is a prudent and necessary policy, but there are times when there is no substitute for "better motives". The establishment of the policy is the work of Founders, of men who in creating it, transcended it. That policy could only be created by men of "better motives". It can only be recreated by men of "better motives".

Since I believe your proposal is a first step in reanimating the Founders' fundamental policy of government. I not only support your proposal, I honor the commitment that you and your colleagues in this endeavor have to be our fundamental constitutional principles.

Sincerely,

JUDITH A. BEST,
*Distinguished Teaching Professor,*
*Political Science.*

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## OBJECTIONS TO THE LINE ITEM VETO CONSIDERED

(Prepared by Judith A Best, Distinguished Teaching Professor)

### THE CONSTITUTIONAL OBJECTION

The objection is that the proposal is unconstitutional because it would change the Constitution, specifically the veto power, by act of Congress alone.

The response is as follows: Articles I, Section 5 of the Constitution permits this procedure. Nothing in Article I, Section 7 is violated by this procedure. Under this proposal, all bills mut be presented to the President. He may sign or veto all bills. He must return vetoed bills with his objections. Congress may override any veto with a two-thirds majority of each House.

Under Article I, Section 5, Congress possesses the power to define a bill. Congress certainly believes that it possesses this power since it and it alone has been doing so since the first bill was presented to the first President in the first Congress. If this construction of Article I, Section 5 is correct, the definition of a bill is a political question and not justiciable. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker* v. *Carr,* 369 U.S. 186 (1962). "A textually demonstrable constitutional commitment" of the issue to the legislature is found in "Each House determine the Rules of its Proceedings." If Congress may define as a bill a package of distinct programs and unrelated items, it can define distinct programs and unrelated items to be separate bills. Either Congress has the right to define a bill or it does not. Either this proposal is constitutional or the recent practice of Congress in forming omnibus bills containing unrelated programs and ungermane items is constitutionally challengeable. If the latter, the President would be well advised to bring such suit against the next omnibus bill.

### THE IMBALANCE OF POWER—IMPERIAL PRESIDENCY OBJECTION

The objection is that the proposal would create an imbalance of power, concentrating more power in the executive thus leading to an imperial Presidency.

The response is as follows: The imbalance already exists and the proposal is an attempt to restore the original equilibrium. This objection appears to be compelling because it invokes a principle convincing to both the theoretical and the practical reason. The good once attained, innovations must be retrogressions or once you're at the top, any movement must be downward. A proper balance of powers once established, any change must destroy the balance. The logical of this argument, however, is not convincing because it is based on the incorrect factual assertion that no charge has yet occurred. The fact is that the balance of power has already been disturbed by Congressional practice, by encroachment on the veto. The proposal is not an innovation, but a restoration.

The objection is unearranted if not absurd because an imperial President has an absolute veto not a qualified one. Congress would still have the power to override any Presidential veto. The objection is invalid because this proposal is limited to appropriations bills and has a two year sunset provision. The very existence of this line item veto would depend upon simple majorities in each House of Congress. What Congress can give, Congress can take away. A more valid objection to this proposal is that it gives too little, not that it gives too much.

Although the less than charitable might describe this objection as the pot calling the kettle black, for it is Congress that has managed to encroach on the veto power through such things as riders, non-germane amendments and pork-barrel provisions in omnibus bills, nonetheless, the balance of power objection is on its face so serious that it deserves a respectful hearing and the strongest possible rebuttal.

Much of the opposition to the line item veto is based on jealousy of institutional prerogative, and this jealousy is usually a good thing. A "prudent jealously," Madison said, is "the first duty of Citizens," and is one of the effectual "personal motives" the Founders decided to employ "to resist encroachments" on the separation of powers. Jealousy of institutional prerogative is desirable and necessary to preserve our balanced system of government. But, prerogative means prerogative and not license. The constitutional prerogative, the exclusive and unquestionable right of Congress, is to pass or to refuse to pass bills and resolutions and to override presidential vetoes by two-thirds votes. Congress has not prerogative to exclude the President from the legislative process or to debilitate the veto.

Opponents charge that with the item veto, "the President can frustrate a decision of the Congress on any individual program." (Hatfield, S13446, Oct. 4, 1984) Yes, indeed. Exactly so. To frustrate, to check, to thwart the decision of ordinary majorities of Congress and thus provide the benefits of reconsideration is precisely what the veto is for. The logic of this objection would support a Congress that produced just one bill each session, a Congress that lumped all bills into one grand all-encompassing measure, thus giving the President but one opportunity to veto, to take all or nothing. This objection is not merely an objection to the item veto, it is an objection to the veto itself, to the veto at it was created and intended to operate. Either the opponents do not understand, or they do not agree with the Founders concept of the separation of powers. Under the separation of powers, Congress was not given the plenary power to legislate. The legislative power was divided, and one-sixth of it was given to the President (one-sixth being the difference between an ordinary majority and a two-thirds majority). That one-sixth of the legislative power is the President's prerogative, his exclusive and unquestionable right.

In terms of legislation, Congress was given the first word and the last word, not the only word, not the unimpeded, unfrustrated word. Congress alone can initiate the lawmaking process by passing a bill. The President cannot initiate a bill. Congress has the last word because it can override a veto. The President does not have an absolute veto. But in between, the President was given the power to frustrate, to check, to thwart. The reason why is most succinctly stated in "Memorial and Remonstrance" where Madison asserted, "The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people." The "great Barrier" is limited government, government with internal controls, with the checks and balances that enforce the "policy of supplying by opposite and rival interests, the defect of better motives."

The "new science of government" that our Founders believed made democratic republics viable was a science of process. In a government of laws and not of men, in a free government of, for and by a huge and heterogeneous people, the the highest morality is, as the great constitutional scholar, Alexander Bickel, said, "the morality of process." Men, who cannot and do not agree on such substantive issues as abortion, school prayer, the nuclear freeze or even various appropriations, can and must still agree on the process by which such decisions are to be made. In a continental country with such a wide variety of religious, ethnic, occupational, racial and social interests, the general will, what all can will, is our constitutional forms and procedures. In any contest or dispute among free and civilized men, the rule of law, the rules that govern the contest are the sine qua non. It is the faith of the democratic-republican that if we follow the constitutional process the public good will emerge.

To violate the process, to defeat or finesse the rules, to disregard the ordained form is to destroy the "great Barrier which defends the rights of the people." That form and process are fundamental can be seen in the great battle cry of our revolution: Taxation without representation is tyranny! Not taxation is tyranny, but taxation that emerges from a defective procedure is tyranny. According to our Founders, the qualified Presidential veto is part of the correct process. Any legislative practices that finesse the veto, that avoid subjection to the full force of the veto, violate the morality of process. If the form is wrong, if the procedure is defective, the law is tyrannical. Legislative practices, particularly in appropriations bills, do debilitate the veto. Restoration is imperative.

### THE PASSING THE BUCK OBJECTION

The objection is that the proposal would decrease responsibility in Congress because Congress could abandon restraint altogether and evade difficult decisions by passing almost everything and leaving it to the President to make the hard choices.

The response is as follows: The proposal will increase the responsibility of Congress because it will mitigate that pernicious form of reciprocity—I'll vote for your pork, for your special interest, if you'll vote for mine—because the payoff for such log-rolling will be much more doubtful. Without the coercive effect of the omnibus bill, the President can scuttle the deal, nullify the bargain. He might well find that one of the items in the trade off is more rational than the other; he might even find that one is in the national interest and the other a mere venality. The incentive for sordid bargaining decreases if the President can undo such bargains in whole or in part.

The Founders asked the common sense question: are men more likely to be responsible when they believe someone can say no to them, or when for all practical purposes they believe no one can? It is clear their answer was the former. Part of the purpose of the veto power is to provide the benefits of anticipation, benefits that have been largely lost because of the omnibus bill. Though anticipation of a veto may and probably will tempt some to abandon restraint altogether, the Founders believed that it would increase the restraint of most. Here institutional pride and jealousy of departmental power and reputation also play a role. When the President vetoes, he must give his reasons so that Congress may reconsider and possibly override his veto. Those reasons are part of the public record. A Congress that flagrantly abdicated its responsibility would be subject to public censure and shame. A Congress that made a practice of hiding behind the President would not escape the notice of the media and the wrath of the people.

The passing the buck objection is based in part on a confusion of ends and means and in part on a policy that is contrary to the policy of the Founders. First, it is highly desirable that our elected representatives be responsible, but that responsibility is merely part of the means and not the end of government. Service in government is far more than a school in character development for elected representatives. That the office can contribute to the making of the man, that the awesome duty of office may and sometimes does improve a man's character cannot be denied, but the opposite is also possible. Some degree of virtue in our representatives is necessary, and that virtue, that responsibility is promoted in a number of ways, most notably by free and frequent elections and a free press to publicize failures of responsibility. The assumption is that the people will choose responsible men in the first place, and remove those who do not measure up. Let us be careful not to confuse ends and means, and let us remember that the final purpose of government is not to develop the virtue of the leaders, but to secure the safety of the people.

Second, although the policy of seeking and depending upon virtue in governing officials is part of a long and honorable tradition, and the Founders did not totally abandon it, yet it was not their central policy. To place sole reliance on responsibility, to place sole reliance on virtue itself, was, to the Founders, the height of imprudence. Their policy was the policy of "opposite and rival interests." Their policy was the separation of powers and the checks and balances. The whole weight of history was on their side. Reliance on virtue had been tried, and it failed to provide safety.

Finally, the pass the buck argument is an argument that in principle applies not just to the item veto proposal but to the veto itself and thus is in opposition to the Founders' policy. Surely the legislative would find it harder to evade responsibility if the Constitution permitted no veto at all. The very existence of the veto power already allows some passing of the buck. Responsibility is a fine quality, and we are right to expect it of all our elected officials, but safety comes first. The people must be protected from bad laws and errors. That protection lies in the checks and balances, that protection lies in a frequently and forcefully used veto power that can be overridden by a two-thirds vote of each House of Congress. The Founders were not about to issue blank checks to any man. It is just too dangerous. Increased responsibility or increased safety? The Founders' answer is safety, for they understood that basic axiom of political science: ruling—law giving—is for the safety of the ruled, not for the interest, advantage or even the virtue of the rulers.

### THE IRRESPONSIBLE PRESIDENT OBJECTION

The objection is that the proposal could permit a President to use the item veto to punish political opponents and uncooperative members of his own party, and to further his personal or ideological interests.

The response is as follows: The proposal contains sufficient safeguards against the abuse of power. First, the sunset provision in this proposal obviates this objection. Such behavior on the part of the President would guarantee the end of the line item veto, and the President would be fully aware of this fact. Second, the two-thirds override of a veto provision in the Constitution was created to fore-stall and counter just such a danger. The Founders believed that this provision alone sufficed. Such actions on the part of the President would be perceived by members of both parties as attacks on the independence of Congress, and men of both parties would stand together to resist the President. They have already done so in the past. Institutional loyalty and jealousy of power and prerogative are fundamental norms of the Congrsss. Third, such an abuse of power by the President could not escape the notice of the media and the wrath of the people. The President would be held to public censure and shame. History demonstrates that the people will not support presidential attacks on the separation of powers whether those attacks take the form of purging or packing. When the people are aroused, Congress is not reluctant to censure or even to bring impeachment proceedings against the President.

### THE INSIGNIFICANT SAVINGS OBJECTION

The objection is that the proposal would not achieve meaningful reductions in the Federal deficit because it cannot be applied to such expenditures as entitlement programs or interest on the national debt.

The response is as follows: The objection is a strawman since no one claims that it is a panacea. It is a beginning, a good faith effort to response to a serious problem and the will of the people. It should and must be followed by other proposals for strengthening the budget process and reducing the deficit. "Every great journey begins with a single step."

The objection is itself a sympton of the disease. Perhaps to some who are used to thinking of budget items in the billions, budgets in the hundreds of billions and deficits in the trillions, several billion dollars in annual savings is a mere drop in the bucket, but to the man on the street even a billion dollars is a very great deal. If a few billion dollars in savings makes no difference, then a few extra billion in expenditures makes no difference either. It is thus that trillion dollar deficits are built.

### THE IMPERIAL CLERK OBJECTION

The objection is that the proposal would create an imperial enrolling clerk with the discretion to determine what constitutes a bill and thereby undo or distort the will of the Congress.

The response is as follows: The Congress and each chamber thereof will still control the format. The clerks are employees of the chambers, hired and fired by the chambers, subject to the will and commands of the chambers. The task assigned to the clerks is purely ministerial.

A more cogent objection to this proposal is precisely that Congress would still control the format and could subvert the intention and make the item veto meaningless by drafting an omnibus bill in "one section or one unnumbered paragraph." Senator Baker made this very point in 1984.

### THE PARTISAN OBJECTION

The objection is that the bill creates a partisan advantage.

The response is as follows: The issue is not a partisan one because for every pet project of the Democratic party open to a line item veto by a Republican President, there is a pet project of the Republican party open to a line item veto by a Democratic President. Although the proposal has a two year sunset provision, the proposal is made with the clear intention of renewing and institutionalizing it if it passes the test of experience.

One important variation of this objection is that a Democratic or liberal President could veto items in defense appropriations passed by Congress. The special status of this argument arises from the national government's exclusive responsibility for defense. Most other domestic items vetoed by a President could be funded by the individual states, but no state could fund a national defense project.

The response to this is as follows: Neither party has a monopoly of concern for the survival of the country. Neither department of government, neither the Congress nor the president, has a claim to unchallengeable judgment about what is needed for defense. If one party is derelict in its duty to the national defense, the proper solution lies in the ballot box, not encroachment on the checks and balances. If one department is derelict in its duty to the national defense, the proper solution lies in the checks and balances, the vigorous revitalized veto and the possible override by Congress.

### CONSERVATIVES AND THE ITEM VETO: A REPLY TO CONGRESSMAN MICKEY EDWARDS

In his article, "A Conservative's Case Against The Item Veto," Washington Post, February 8, 1984, Congressman Mickey Edwards makes his case against the line item veto for the President, saying that it is a conservative's case, and chastising his fellow conservatives for supporting a proposal that he believes is incompatible with their philosophical principles. While he invokes old American political principles, he misapplies and misunderstands those principles, and therefore, I believe his case ultimately fails.

When it comes to constitutional issues such as the separation of powers and the checks and balances, let us fervently hope that we are all conservatives as we are all liberals. Our Constitution was established on the classically liberal principles that just government rests on the consent of the governed and protects the natural rights of men. The Constitution is undeniably a classically liberal document. A conservative, as I understand the term, is one who desires to preserve the established order, in this American context, the constitutional order designed and ordained by the Founders. The perpetuation of our political institutions, therefore, requires that all true American liberals must also be conservatives, and all American conservatives must also be true liberals. The principles that American conservatives desire to preserve are liberal principles.

Mr. Edwards argues from the fundamental American principle of the diffusion of power. He attacks both concentration of power and change. He argues that "the harder it is to write and rewrite laws, the greater the protection for the people." These ideas and principles are clearly conservative, are clearly reflective of the Founder's views, and yet they are perversely applied against the item veto. The item veto would make it "harder" to write and pass laws, and in all likelihood make it necessary to rewrite them more often. The item veto would reduce the concentration of power in the legislature by revitalizing the veto power. If Mr. Edwards believes, as he says, "Difficulty in bringing about change is again a cardinal virtue," then it would follow that he would support a proposal on the item veto because it is more difficult to muster a two-thirds majority in each chamber than an ordinary one. The argument does not make sense unless the term change refers only to an alteration and reduction in the power of Congress to avoid and finesse the veto. The change he fears is not change in the laws per se but rather change in the *current* law-making process, a process in which Congress now presents the President with all or nothing choices, a process which has warped and weakened the veto depriving it of the vigor the Founders desired. That this is indeed the case is indicated by his explication of the central philosophy of conservatism.

Mr. Edwards argues that opposition to the concentration of power "is the single philosophical element" which unites all conservatives of the American tradition. He is right, but he tends to find the danger of concentration only in the Presidency. In this he differs markedly from the Founders and from Madison in particular. For our Founders, a concentration of power in the hands "of one, a few, or many," was to be feared and resisted. (Federalist 47). Mr. Edwards believes that because Congressional power is in the hands of many rather than one, it is less dangerous. The Founders would not agree. The many, when they unite, when they act in concert, when they engage in such practices as logrolling, can be as dangerous and tyrannical as one man. Mr. Edwards may believe that in principle the legislature is the least dangerous branch of government, but that view was definitely not the view of the Founders. The Founders feared legislative dominance, and because they did, they divided the legislature into two chambers. They did not divide the executive. Indeed, they exerted themselves to create a strong, vigorous and independent executive.

This is not to say that they saw no danger in executive power, for they did, and they took steps to avert the danger. Rather, it is to say, as did Madison in Federalist 51, that, "In republican government, the legislative authority necessarily predominates." He concludes that the first remedy for this dangerous imbalance is bicameralism and different modes of election to each chamber. But, even this, he says, is not enough, for the "weakness of the executive" requires further fortification, that fortification is the veto power. According to our Founders, it is not the veto power that is to be feared, but its absence and its debilitation.

As I have argued elsewhere, the Founders intended that the veto be frequently and forcefully used, not only to prevent bad laws and errors, but to institutionalize the benefits of reconsideration and to produce that anticipation which brings self-control. If the Founders were with us today and saw the extent to which Congress has encroached on the veto power with its omnibus bills filled with riders, non-germane items and pork barrel, they would support proposals to rehabilitate the veto power.

Mr. Edwards case is conservative, if to be a conservative means the desire to preserve any existing power relationship or any current practice however debased or decayed. In such a case even successful radicals must be called conservative since they too wish to preserve the changes they have brought about. It seems to me that the true conservative, in fact the true statesman, is the man who works to preserve, to renew, to recover and to restore the balance established in our original constitutional solar system.

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EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET
*Washington, DC, February 15, 1985.*

Hon. MACK MATTINGLY,
*U.S. Senate, Washington, DC.*

DEAR MACK: Thank you for your recent letter concerning S. 43, legislation that you are sponsoring to provide the President with authority to veto individual items in appropriations bills.

As the President stated in his State of the Union address of February 6, 1985, the Administration supports enactment of S. 43. In our view, the authority that S. 43 would confer upon the President would be a major step forward in getting unneccessary Federal spending under control.

I look forward to working with you to ensure early passage of this important legislation.

Sincerely,

DAVID A. STOCKMAN, *Director.*

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THE SECRETARY OF THE TREASURY,
*Washington, DC, February 12, 1985.*

HON. Mack Mattingly,
*U.S. Senate, Washington, DC.*

DEAR MACK: This is in response to your January 17 letter to former Secretary Regan requesting his support for S. 43, to provide for a line item veto. As President Reagan made clear in his State of the Union address, the Administration is firmly behind your proposal.

I look forward to working with you to enact the line item veto, and appreciate your leadership on this important issue.

Sincerely,

JAMES A. BAKER, III.

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CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
*Washington, DC, January 30, 1985.*

HON. Mack Mattingly,
*U.S. Senate, Washington, DC.*

DEAR MACK: Thank you for your recent letter concerning legislation for a line item veto, S. 43. The Chamber supports the passage of such an amendment. Giving the President the power to veto specific spending bills would lead to greater fiscal discipline. We are quite pleased with your efforts on this issue.

We are in the process of gathering political support in favor of S. 43. Directions have been sent to our field offices for the purpose of influencing members of Congress. Also, I would like to extend an invitation to you to appear on our cable television network, BizNet. This will give you an opportunity to convey your message to the public.

It will be a pleasure to work with you in the 99th session of Congress.

Sincerely,

RICHARD L. LESHER.

Enclosure.

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NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
*Washington, DC, February 28, 1985.*

Hon. MACK MATTINGLY,
*U.S. Senate, Washington, DC.*

DEAR MACK: On behalf of the 500,000 members of NFIB, I would like to thank you for sponsoring S. 43, a bill which would give the President line-item veto authority over appropriations.

In a recent poll, the members of NFIB indicated their support for Presidential line-item veto authority by a 67 percent majority. In our opinion, a line-item veto could serve as a significant tool in efforts to reduce the burgeoning federal budget deficits. Giving the President such authority would recognize the responsibility he shares with Congress in regaining control over federal spending.

We believe S. 43 offers a responsible line-item veto approach in that it will enhance the President's control over spending without encroaching on the appropriations authority of Congress. Under this approach, the President could reject specific items in an overall appropriations bill without vetoing the entire bill. In addition, under the structure of this bill, the Congress could override the President's veto of a specific item if there was strong objection to it, just as the Congress might override the President's veto of an entire bill.

NFIB appreciates your leadership in this effort to lead our government back to fiscal responsiblility.

Sincerely,

JOHN J. MOTLEY, III,
*Director of Federal Legislation.*

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FOUNDATION FOR THE PRESIDENT'S PRIVATE SECTOR
SURVEY ON COST CONTROL, INC.,
*Washington, DC, January 26, 1985.*

Hon. MACK MATTINGLY,
*U.S. Senate, Washington, DC.*

DEAR MACK, Many thanks for your letter and the copy of S. 43.

I applaud your efforts and initiative.

We will do everything we can to help.

All the best,

Sincerely,

J. PETER GRACE.

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BOARD OF SUPERVISORS,
COUNTY OF LOS ANGELES,
*Los Angles, CA, February 21, 1985.*

President RONALD REAGAN,
*The White House, Washington, DC.*

DEAR PRESIDENT REAGAN: At its meeting held February 19, 1985, on motion of Supervisor Michael D. Antronovich, the Los Angeles County Board of Supervisors went on record in support of Senator Mack Mattingly's bill for a two year trial of the line-item veto.

In making his motion, Supervisor Antonovich stated that the line-item veto is currently being used by 43 State governments and was paramount in California Governor George Deukmejian's ability to turn a $1.5 billion deficit into a balanced budget with a surplus this year.

Very truly yours,

LARRY J. MONTEILH,
*Executive Officer.*

May 13, 1985.

Hon. Mack Mattingly,
*U.S. Senate, Washington, DC 20515*

Dear Senator Mattingly: We the undersigned organizations strongly support your efforts to secure a statutory Presidential line-item veto authority. As you are aware, the relentless increase in Federal spending has brought into focus the need for appropriations reform. The politics of parochial self-interest remain very strong and Congress is under continuous pressure to preserve programs that benefit local constituencies.

The line-item veto would create a new force within the appropriations process. It would allow the President to exercise his veto authority on individual expenditures without jeopardizing entire spending bills, thus making the President an active participant in trimming the Federal deficit.

In his televised budget address to the nation on April 24, President Reagan said with regard to line-item veto: "If Congress can't bring itself to do what's right—they should at least give me what 43 Governors already have—a line-item veto. Then I'll make the cuts; I'll take the responsibility and the heat. And I'll enjoy it."

Congress needs line-item veto to enhance its efforts to reduce Federal spending. Your bill, S. 43, which establishes a two-year trial period for Presidential line-item veto authority, provides an excellent vehicle for Congress and the President to work together to bring deficit spending under control. We believe that S. 43 deserves the full support of your colleagues, and look forward to working with you toward ensuring its passage.

Sincerely.

American Association of Physicians and Surgeons, American Bankers Association, American Business Conference, American Electronics Association, Business Executives for National Security, Chamber of Commerce of the United States of America, Citizens for America, Coalitions for America, Competitive Enterprise Institute, Conservative Caucus, Council for Citizens Against Waste, Free the Eagle Citizen's Lobby, National Association of Wholesaler-Distributors, Public Advocate, Students for America, United States Business and Industrial Council.

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American Farm Bureau Federation,
*Washington, DC, May 22, 1985.*

Hon. Charles Mathias,
*Chairman, Senate Rules and Administration Committee, U.S. Senate, Washington, DC*

Dear Mac: The American Farm Bureau Federation represents over 3.2 million member families in 48 states and Puerto Rico. Farm Bureau's top priority in the 99th Congress is the reduction in the size of the federal government through spending cuts. We believe that the elimination of the federal deficit will do more to enhance the economic well-being of farmers and ranchers than any other action that could be taken by the Congress. To help achieve elimination of the deficit, we believe that the President must be able to use every possible tool to reduce spending. The line item veto is one such tool.

At the 66th Annual Meeting of the American Farm Bureau Federation last January, voting delegates of the member State Farm Bureaus adopted the following policy with regard to line item veto:

"We support legislative or constitutional changes to give the President line item veto power in appropriations bills."

Line item veto would give the President increased authority as well as responsibility for restraining the growth of federal spending. Based upon Farm Bureau's policy, we are pleased to offer our support for the proposals that have been the subject of recent hearings before the Committee. By permitting the veto of individual items within appropriations bills, the President would be able to continue his executive authority while refraining from signing appropriations for items which are clearly inconsistent with restraint of federal spending.

Thank you for your consideration of Farm Bureau's policy. We ask that this letter be included in the hearing record.

Sincerely,

John C. Datt,
*Executive Director, Washington Office.*

[From the Wall Street Journal, Feb. 7, 1985]

## VOTE THE VETO

Last Thursday, Sen. Mack Mattingly of Georgia met privately with the president and told him that he is now within several votes of the number needed to enact line-item veto authority for the president.

Last night, Ronald Reagan went up to Capitol Hill and in his State of the Union address urged Congress to enact Sen. Mattingly's bill.

What's behind this sudden mementum on the item veto? Votes. Sen. Mattingly gave the president a letter urging him to publicly endorse the bill. The letter had 47 signatures. They fill three pages with great senatorial flourishes—Bob Dole, Phil Gramm, John Warner, John Chafee, Larry Pressler, John East, Alan Simpson, Arlen Specter. They have signed on to the Mattingly line-item veto bill from all the current pigeon-holes-pragmatists, ideologues, moderates. The signatories include as well a Who's Who of fiscally sane Democrats—Fritz Hollings, Joe Biden, Bill Proxmire, David Boren, James Exon, Edward Zorinsky.

It is altogether appropriate to undertake a serious push for spending discipline in the same week that Washington officially started deciding how to spend $973 billion. The existing veto, which can shut down several departments at once, has become pointlessly destructive. It is obsolete.

Because the Mattingly item veto would be enacted legislatively, not via a constitutional amendment, it could become effective on passage. The House of course would have to vote for it as well. The first thing people will say about this is: Forget it. The second thing they will say is: What if the president barnstorms around the country in 1986 waving the Senate's act of fiscal responsibility in the face of Tip O'Neill's colleagues? And the third thing people will say is: Why would the House vote against something that would allow it to lay all the blame for these terrifying spending-cut decisions on Ronald Reagan?

The Mattingly bill would require every spending item in an appropriations bill to be enrolled as a separate bill for presentation to the president. His item veto could be overridden by a two-thirds vote. This law would expire in two years, when it would require renewal. The burden of usefulness obviously would rest on the item veto's supporters.

This last provision will surely elicit a great horselaugh from the item veto's opponents. They argue that so little non-defense discretionary spending resides in the budget that the item veto's effect on the deficit would be insignigicant. This facile argument deserves a high-school debater's answer: If the thing is so harmless, what's the harm in giving it a try? In point of fact, the line-item veto is opposed because it would be all too efficient at reordering the political culture of Washington.

The item veto's real threat to the status quo does not lie in its ability to chisel dollars off the top of this $973 billion block of wood. Its powers is that it turns the president from a passive to an active participant in the budget process. The other day Budget Director David Stockman parried agricultural policy with members of the Senate Budget Committee, hinting at administration backing for a farm-credit bailout in exchange for Senate action reducing permanent price-support subsidies. Any child can see that this kind of bargining would be tipped decisively toward budget discipline if Mr. Stockman were backed with a president's power to zap spending for the individual handouts being pushed by individual senators.

More broadly, with an item veto looming, both the president and Congress would have to make their priorities clearer than they do now. The president might conceivably make clear that he wants his Ag Department reforms, opposes the land speculators' bailout, and wants to abolish urban-development grants, defund Legal Services and achieve five key Grace Commission reforms. Such a list wouldn't merely reflect a shuffling of budget accounts, but the president's view of what are and are not appropriate responsibilities of the national government. Congress, including the fiscally sane Democrats, would lay competing priorities and legitimately held beliefs on the table. They would do deals. They would do politics. But spending restraint would be dealt a better hand.

If the budget process is now perceived to be a captive of special interests, that is because the budget process is largely a captive of Congress, which quite properly respresents special interests. The line-item veto would enable the president to pose his national constituency against Congress's particular constituencies. For many unfortuante reasons, Congress has evolved the budget into what is now essentially a secret activity. With the budget now approaching $1 trillion, that concealment is irresponsbile and indefensible. It must stop. And the quickest way to stop it is to enact the Mattingly line-item veto bill.

[From the Wall Street Journal, Feb. 26, 1985]

## RESCUE THE SENATE!

Don't be surprised if they start putting up bunkers soon around the Capitol building in Washington; it's becoming increasingly evident that the gentlemen and ladies of Congress are under siege. The nation's governors are holding their annual meeting in Washington this week, for example, and had great sport ridiculing the Hill's quixotic attempts tc cut the budget.

When a parade of senators and House members came before the governors to describe the heavy burden of budget-reduction, the state executives practically hooted their federal colleagues out of the room. California's Republican Gov. George Deukmejian described their presentations as "a lot of hand-wringing." Massachusetts's Democractic Gov. Michael Dukakis, taking up the issue of fiscal responsibility, mocked the visitors from Capital Hill for not doing in four years what most governors have been doing in a single session. "These guys," he told his fellow governors, "tell us it's painful and excruciating and, 'Oh, it's so difficult.'" The governors laughed.

Today the governors will stop laughing and start voting on a series of resolutions approved by their association's executive committee. One of those resolutions calls for empowering the president with a line-item veto over appropriations. Currently 43 of these 50 governors hold a similar line-item veto authority. It would be most informative to have someone like Gov. Deukmejian sit down on one of our TV-interview programs and explain the political dynamics of the item veto to Washington's politicans and pundits. We suspect that what he and many other governors would say is that the item veto is the indispensable tool in any effort to extract spending discipline from a body of legislators.

If we have learned anything from these first weeks of budget politics, it is that the Washington status quo—the politics of self-interest—is very likely to again grind the budget process into dust. Right now it's the farmers. Barely into a new session, the Senate stumbled into gridlock last week over the farmers' bailout and the Meese confirmation vote. The paralyzed Senate recessed after midnight Friday and came back for more on Saturday, when Majority Leader Robert Dole was finally able to cut a deal with farm-state Democrats. This may be February, but Washington's politics is already resembling the manic eleventh-hour continuing-resolution atmosphere of late November 1984.

Surely it must be evident to serious Republicans and Deomcrats by now that Congress has some severe institutional problems that operate independently of any individual politican's assertions about spending freezes or reductions in cost-of-living increases. There is little reason to believe that these institutional weaknesses will not again cause the annual budget gridlock that is turning Congress into an unfortunate laughingstock. The remarks by Govs. Dukakis and Deukmejian make it evident that high officials from both parties are willing to lob bombs inside the Beltway. And speaking at a White House dinner for the governors Sunday night, President Reagan likened Washington to "the Twilight Zone."

What we have now in Washington is a budgetary system that has the appearance but rarely the substantive results of serious politics. It is political burlesque. The line-item veto would create a significant new force outside the congressional system. The president would have to make his priorities explicit. Congressional Republicans and Democrats would have to bargain with the president. Both sides would have to do what is rarely done now—make choices.

The vehicle most likely to return serious politics quickly to Washington is Sen. Mack Mattingly's bill to legislatively give the president a line-item veto for two years. Mr. Reagan endorsed the experiment in his State of the Union address. The bill currently has 47 co-sponsors, including six Democrats as well as the majority leader and other ranking Republicans. But it remains mired in the parliamentary swamps. The stately procedures of the Senate are not tampered with lightly, only when farm senators unleash a filibuster against a cabinet nominee in order to get a vote on their land speculators bailout bill.

The Hill needs help. Sen. Dole's earnest efforts at a budget solution have been thwarted, and the Senate is already dissolving into an orgy of politics as usual. Senators of both parties ought to be concerned about the future of the World's Greatest Deliberative Body. And they could start to rescue themselves if more Democrats signed up on the Mattingly bill, and if Sen. Dole and the Republican leadership turned their full ingenuity toward ensuring an early vote.

[From the Wall Street Journal, Apr. 18, 1985]

## GETTING SERIOUS

They're doin' it again. "It" is the congressional budget process. This Monday the Senate will begin floor deliberations over what the process calls a "budget resolution." Bear in mind that this is April and that for the last two years the "process" has lasted until December, when a "continuing resolution" has been cobbled together in the dark of night by congressional staff assistants no one has ever heard of, let alone voted for. But—lest readers judge us too cynical—things could be different this year.

Congress's budgeteers this year are likely to encounter two new elements alien to their status-quo politics. The first is the new White House-GOP budget that reduces outlays in part by killing many long-lived federal programs. The second is the probability that Majority Leader Bob Dole will schedule a vote on Sen. Mack Mattingly's bill to legislatively empower the president to veto line items in this year's budget. Critics of the item veto can no longer claim the administration wouldn't use it, and coupled with the proposals to close out programs it is the one proposal that could decisively change the process that has put the budget out of control.

Indeed, the program-killing budget proposal and the Mattingly item veto constitute the only serious attempt we're likely to see this year to enact spending control that the markets would recognize as spending control. The alternatives—notably an across-the-board spending freeze emerging from the House Budget Committee—do little more than defer an eventual return to the current, economically debilitating status quo.

The tradition-busting significance of what Bob Dole brought away from his negotiations with the White House becomes clearer when you see a simple list of the programs to be eliminated. Those that would cease to exist with this budget or in a few years are: general revenue sharing, the postal subsidy, the Small Business Administration, the Job Corps, urban-development grants (UDAG), the Amtrak subsidy, the FmHA rural-housing program, direct loans from the Ex-Im Bank and Conrail via a sell-off. Programs to be phased out over time are the crop-insurance subsidy and the Rural Electrification Administration. Spending reductions and significant changes in spending formulas would touch some 28 other programs affecting students, farmers, the Medicaid program, federal workers and pensioners, scientists and others.

To get the cuts and terminations, of course, President Reagan agreed to back off from his military budget. In return, he got the support of the leaders of his fellow Republicans in the Senate. Now he will be asked to compromise with the full Senate, then with the Democratic leaders in the House, then with the full House, then with the Conference Committee. And no one can make any of the deals stick. As Barry Goldwater says, "There will be more attempts to amend this bill than any bill that ever came to the floor."

So on recent form next week's budget news will probably degenerate into a din of whining about "pragmatism" and how we can't do it what with the '86 elections only 500 days away. When Congress and the White House will embark on a confusing and debilitating round of compromises over "saving" UDAG grants, Amtrak subsidies and the like. By the end of the session, the president will have compromised a half-dozen times on the military budget, the spending interests will have run amok, and we will have a "budget" like all other recent budgets.

Imagine how much more productive and rational the process would be if Congress enacted the legislative line-item veto. This budget's program terminations amount to a public listing of where Ronald Reagan's item vetoes would fall. Anyone who wanted to save these programs would be required to give up something in bargaining, and the president would have recourse if Congress failed to deliver. With this mind-clearing discipline, the bargainers could bypass this swamp and get down to bedrock bargaining. That means cutting a deal over this budget's two most volatile aspects—Social Security cost-of-living adjustments and defense spending.

By proposing the actual elimination of moribund federal programs, the president and Majority Leader Dole have taken a first, significant step in breaking the cycle of budget failure. But this is not enough without something to instill some discipline in the process. The next step, which needs to be taken before the opportunity of enacting this budget is lost, is for Mr. Dole to move the Mattingly item veto onto the Senate calendar and for Mr. Reagan to lobby actively for its adoption in both houses. Then spending control and deficit reduction will at least have a fighting chance.

[From the Wall Street Journal]

## S. 43

We watched with great interest last week as the U.S. Senate tried in its budget deliberations to figure out how to slash the budget in an economically significant way while simultaneously retaining such vital national commitments as Amtrak and the Small Business Administration. By week's end, the White House compromised with Congress; In return for some marginal spending cuts for Amtrak, the Job Corps and whatnot, plus a freeze on Social Security increases, the White House agreed to cut the real growth in spending for the Defense Department to zero.

The more we watch this process, the more we think Washington is overlooking one other significant way to save time and money: Abolish the White House.

Who needs it? The executive branch exists to inject into the political process some sense of direction or discipline, but it no longer has the tools to spike the narrow-interest logrolling inevitable in the 535-person committee at the other end of Pennsylvania Avenue. Indeed, the presidency looks more and more like a hapless intruder into the village calm of the nation's capital.

Consider, for instance, that the White House's current resident carried 49 states in the past election, and that he was given nearly 60% of the popular vote after four years of widespread coverage of his desire to severely cut back the federal presence in the American economy. Every voter in America knew that Ronald Reagan was not Howard Baker or Gerald Ford. And presumably the president believes that the results of the November election are the way our political system tells an incumbent president to follow his own well-advertised instincts. So, two weeks ago, Mr. Reagan went on national television to describe in detail his desire to eliminate most of the federal programs he said he wanted to eliminate back in 1981.

Now consider again last week's "compromise": The president gives away the one thing he campaigned for—restoration of the nation's defense—and virtually caves in on the one thing he campaigned against—the 20-year proliferation of domestic spending programs. So much for the imperial presidency. Sen. Domenici assures us this will not kill any weapons programs; they will only be stretched out, which means that over a period of years the cost of the weapons will be increased in the name of balancing the budget.

Getting the president to stipulate that he can live with zero growth in defense is in fact absolutely all that has been accomplished in the compromise. Everything else is meaningless. Next comes negotiations with the House Democrats, then comes the negotiations with the conference committee, then comes the negotiations with the appropriating committees in both houses and their conferences. Finally when Congress cannot pass a budget at all, there comes the negotiations with the faceless congressional staffers who will write the "continuing resolutions" in the last hours of the fiscal year.

If any further evidence was needed that the White House is now playing by Congress's rules, it was Mr. Reagan's statement Friday that "I have the agreement of the Senate that if this represents a cut in [defense] spending beyond where we should go, I will be returning for a supplemental appropriation." If so, Mr. Reagan will probably have to take a ticket to get in line behind the likes of Republican Sen. Al D'Amato of New York as he tries to get funding added back for mass-transit subsidies. "Supplemental appropriations" is a device Congress has used for two years to appropriate money effectively out of public view. Little national coverage, no accountability, no one takes heat for anything, everyone gets reelected. It is unfortunate to see Mr. Reagan indicating his willingness to participate in this.

We prefer the proposal the president made in his budget speech the other night: "If Congress can't bring itself to do what't right, they should at least give me what 43 governors already have—a line-item veto. Then I'll make the cuts; I'll take the responsibility, and the heat. And I'll enjoy it."

The process of establishing the item veto starts tomorrow. Sen. Charles Mathias (R. Md.) is scheduled to hold a hearing on S. 43—the bill introduced by Sen. Mack Mattingly of Georgia and co-sponsored by 46 senators that would create a legislated line-item veto power over appropriations for the president. This is the one proposal on the horizon that would correct the present imbalance between executive and legislative branches, allowing each to do its job and the government to form a budget with some priorities, or indeed any budget whatever.

Sen. Mathias is reportedly no friend of the item veto, and he did not join his many Republican colleagues in co-sponsoring the Mattingly bill. What is at issue at this point in the process, however, is whether the Rules Committee will send the item-veto legislation on to the full Senate, with or without a favorable recommendation.

Once in the Senate, the item veto's fate falls to Majority Leader Bob Dole, who alone is able to bring the bill onto the floor for debate. Sen. Dole surely deserves some kind of credit for keeping all those budget balls in the air. But as the great compromise—Social Security cut and all—moves over to the fun House, the importance of keeping the Mattingly item-veto bill alive becomes more urgent.

The CHAIRMAN. Thank you very much, Senator Mattingly.

You said that you thought if we could save even $1 million, the taxpayers of the United States would rejoice. And I absolutely agree that is the case.

However, that prospect does not guarantee that Congress will act. The estimate for mailing costs for the Congress for the coming year is not $1 million—it is $144 million. And of that sum 98 percent is spent for self-generated mail, for newsletters with pictures of Members and that kind of thing; $144 million, 98 percent self-generated—only 2 or 3 percent spent in answering the questions and correspondence of constituents.

And we haven't been able to restrain even that amount of spending.

So while I agree that I think taxpayers would rejoice in saving a million dollars, we have got a long way to go in disciplining the Congress itself in making those economies.

Let me ask you for the record, so that it is absolutely clear exactly what you have in mind: Do you envision that each appropriation will be the subject of a special bill, that of the several thousand items in each appropriation bill under the current practice we will have a separate rollcall vote? Exactly what do you envision?

Senator MATTINGLY. Under the bill's provisions, the enrolling clerks would transmit each numbered section or unnumbered paragraph to the President as a separate piece of legislation.

The CHAIRMAN. In other words, you would envision the appropriation taking place as it is done under the present practice, and a single final rollcall vote, as it is currently done?

Senator MATTINGLY. Yes; that's correct.

The CHAIRMAN. And then you would envision that the clerks of each House would divide the bill, item by item, and would enroll a separate bill for each item?

Senator MATTINGLY. Each item would be considered as a separate bill.

The CHAIRMAN. And each one would be signed by the Speaker and the President of the Senate?

Senator MATTINGLY. The procedures now used would not be changed. Each bill would be sent to the President, the way it is now done. He would have the opportunity to sign or reject each bill.

The CHAIRMAN. Explain to the committee exactly how you envision this to work, because I think this is an important element of legislative history.

Senator MATTINGLY. After passage of an appropriation bill in the same form by both Houses, the enrolling clerks in the originating House will prepare each numbered section and unnumbered paragraph as a separate piece of legislation for presentation to the President. Congress, of course, would determine the specific content of each appropriation bill and of the contents of each paragraph and sections within the legislation.

The CHAIRMAN. The legal opinion that was submitted by Mr. Killian, whose legal opinions command great respect in the committee, says that if we were simply to authorize the President to pick and choose among the provisions of the same bill, we would contravene the clear provisions of the Constitution for legislation.

So that's not what you are proposing to do.

But it seems to me that what he does say further is that if you are going to avoid that constitutional prescription for legislation, then you have to pass separated bills. And that is the procedure I think we ought to understand: At what point do you separate these bills, after the rollcall in the Senate?

Senator MATTINGLY. I believe Mr. Killian stated his belief that separate bills would not have to be passed because it would be Congress that would be the sole determiner of the content of each piece of legislation. The bills would be separated during the enrolling process.

The CHAIRMAN. After the rollcall in the House?

Senator MATTINGLY. After passage of the legislation in the same form by each House. Former Senator Baker had noted that Congress may decide to pass appropriation bills consisting of one lengthy, enormous paragraph in an effort to circumvent the live item proposal and, in fact, nothing in S. 43 precludes Congress from shaping legislation in any way it desires. I doubt, however, that the electorate would allow the Congress to subvert, if this is passed, the line-item veto trial. I prefer to believe that there would be a good faith effort on the part of Congress to give the proposal a fair trial. The duties of the enrolling clerks would not change.

The CHAIRMAN. I am not worried about anything detrimental to the people of the Congress; I am worried about something that may be detrimental to the people of the country, though.

Senator MATTINGLY. The bill has been carefully structured to contain a sunset provision.

The CHAIRMAN. And the Constitution does not envision enrolling clerks as agents in the legislative process, and that's why I press you a little bit on exactly what the procedure would be, because I think it's perfectly clear, as Mr. Killian says—and I think it's clear to any observer—that Congress could accomplish the purpose here by passing 1,000 separate bills; nobody would object to that, except for the time it would take to do it.

Now, Mr. Killian says if we can do that directly, we may have a way of doing it indirectly. But I think we ought to understand exactly what that indirect method is.

Mr. MATTINGLY. The job of the enrolling clerk remains the same. I quote from a House document entitled "How our laws are made": "The preparation of an enrolled bill is a painstakingly important task. It must reflect precisely the effect of all amendments either by way of deletion, substitution, or addition agreed to by both bodies." And it goes on to say "From these he must prepare meticulously the final form of the bill as agreed to by both the Houses for presentation to the President."

So the job of the enrolling clerks would continue to require faithful reflection of the will of congress.

The CHAIRMAN. The bill itself, S. 43, on page 3, section (c), it says "For purposes of this concurrent resolution, the term 'item 'means any numbered section and any unnumbered paragraph of . . . any general or special appropriation bill, and . . . any bill or joint resolution making supplemental, deficiency, or continuing appropriations."

Now, those would be the directions to the enrolling clerk, correct?

Senator MATTINGLY. Yes, as a definition of what constitutes a bill under the terms of this proposal.

The CHAIRMAN. Senator Ford?

Senator MATTINGLY. Let me make one further point. I think the 2-year trial period called for in the line-item veto legislation, will provide a basis for assessing the actual merits of the proposal. I believe it's workable and I believe a majority of in the Senate thinks it's workable, but it may well be that after the 2-year trial period some modifications may be desirable.

The CHAIRMAN. Have you considered the possibility of errors that could occur in the handling of these thousands of pieces of paper that would be generated under this system?

Senator MATTINGLY. I don't think there is anything to be afraid of. You mentioned earlier the proliferation of paper here in Congress. All we are trying to do is make the process work.

And the best way to see if this idea is workable, is a 2-year trial. I think the people of the country are willing to have a little bit more paperwork in order to control spending.

The CHAIRMAN. We have had experiences where complex legislation which is cut and pasted, which is a process that I perceive would take place here, has resulted in errors. When the revision of the Criminal Code was tacked onto the continuing resolution, and there were revisions being made right up to the end, some of the pages didn't get down to the White House, and we now have a legal question of whether those pages which were approved by the Congress but not within the document when the President signed it are in fact part of the Criminal Code or whether they aren't, whether they have to be re-enacted now.

Senator MATTINGLY. Well, maybe you can reduce the amount of paperwork that goes out for newsletters, and we will make up for it on this. Really, you cite some of the problems encountered when we legislate through continuing resolutions. That is further evidence of the need for a live item veto.

The CHAIRMAN. Well, if I have your pledge of cooperation on that, why, I will——.

Senator Ford?

Senator FORD. Thank you, Mr. Chairman. I think you have raised a legitimate and valid point.

Senator, let me kind of express my thought about this, and then ask you a question, if I may.

There would seem to be a series of questions whether the scheme—and I use that for lack of a better word, I guess of enrolling as separate bills each project or program item for possible veto action would be a valid exercise of legislative power, since such separate bills would not have been acted opon as separate bills by the Congress.

How could we be sure that such items out of the package would have in fact passed each House?

Senator **Mattingly**. Through the same protective devices now used. Not only would the enrolling clerks be dealing only with the bill as it was passed in final form, but their work would continue to be double checked for accuracy by the House Administration Committee and/or the Secretary of the Senate.

Senator **Ford**. I'm not a lawyer; I'm hung out on just trying to be——.

Senator **Mattingly**. I understand your concern but I believe adequate protection exists.

Senator **Ford**. That sounds like a lawyer I turned around to one time; I said: what should we do? He said: go either way, and we'll make a good case.

What if the clerks of the House and the Senate disagree on how to enroll this massive piece of legislation going to the President?

Senator **Mattingly**. Only the clerk in the originating House enrolls the bill for presentation to the President.

Senator **Ford**. Sir?

Senator **Mattingly**. Both clerks don't enroll the same bill.

Senator **Ford**. Are they supposed to get together and make a decision on what's to be enrolled and what's not to be enrolled?

Senator **Mattingly**. There would be no subjective decisions involved; the clerks would be bound by the definitions in S. 43..

(Senator Mattingly and staff consult.)

The **Chairman**. While the Senator is consulting with staff, let me ask the chairman of the Appropriations Committee how many items are in a typical appropriations bill?

Senator **Hatfield**. Mr. Chairman, I would like to use my testimony to point that out, because the fallacious understanding of this whole line-item veto demonstrates a lack of comprehension of how the procedure really functions in the Senate.

For instance, they are always talking about pork barrel. None of those specific items in Virginia that are included in the Corps of Engineers, or in Maryland or Kentucky or Illinois or Oregon, are included in the bill—they are in the report.

So they do not even get to the line-item question there. If you want to veto them, then you are going to have to veto the whole construction section. But let me point those out, Mr. Chairman.

The **Chairman**. We will await with bated breath to testify before the Senator from Oregon. [Laughter.]

Senator **Mattingly**. Historically, the House enrolling clerk enrolls appropriation bills.

Senator **Ford**. The House clerk would set the items.

Senator **Mattingly**. Yes, for appropriation bills.

Senator **Ford**. Now, are you giving the House then the prerogative over the Senate as to selecting and setting the items.

Senator **Mattingly**. No. There seems to be a tacit understanding that appropriation bills, viewed loosely as "revenue" bills, originate in the House.

Senator **Ford**. Well, I thought that was about raising taxes. I did not think that was about enrolling bills.

Senator **Mattingly**. Well, you are correct. The Constitution only cites 'revenue' bills but time, custom, and precedent seem to have expanded that, somewhat.

Senator **Ford**. Is not this too serious a change to make on a trial basis?

Senator **Mattingly**. No. I think that is the exact reason why we should try it on a 2-year trial basis. It is a good test to see if it will be used properly by the executive branch, in my opinion, and I think along with the majority of the American people, that it is worth a try; I am on the same side as you. If the executive is going to abuse it, then I do not want to see it renewed.

But viewed historically, I believe that the constitutional veto authority that was given the President of the United States to veto legislation, has been debilitated because of the size and timing of many of the appropriations bills passed by Congress. That is fact.

Now, if you want to ignore those facts, that is fine, but there has been an erosion of that legitimate authority; many times a President receives a bill, and he has no choice but to sign it and take the good with the bad, and I think that is a poor thing to let happen to the taxpayers of our country.

Senator **Ford**. Well, see, you just made the statement that is going to create the real problems. It is what is good and what is bad in one individual's mind.

Senator **Mattingly**. No, I——

Senator **Ford**. No. Now, wait a minute. That is exactly what you said, whether it is good or bad. Now, on that basis, whatever he or she might do in the Oval Office, it is going to create some furor under the present circumstances. The question I am about to ask you is this. Is not the only time that a line-item veto will not be viewed as a political decision is when we have a balanced budget?

Senator **Mattingly**. No.

Senator **Ford**. No?

Senator **Mattingly**. Let me say this. As a reminder, the Constitution gave the Congress the first word, legislatively speaking, and the Congress has the last word, with veto override authority.

Senator **Ford**. Well, I know that.

Senator **Mattingly**. But it was not given the only word.

Senator **Ford**. Well, I understand that, but if you have a third of the Senate and a third of the House, you have the last word, and that is not a majority.

Senator **Mattingly**. Well, let me point out that last year a small bill of interest to the Senator from Oregon, that only affected Oregon, was vetoed by the President and yet the Senator from Oregon was able to convince his Senate colleagues that the matter was justified and the veto was overwhelmingly rejected.

Senator **Hatfield**. Ninety-five to nothing.

Senator **Mattingly**. Ninety-five to nothing. Now, the point is that there are items that can be defended and there are probably items that cannot be defended. The items that cannot be defended are the ones that need to be rooted out of that budget in the legislative process, Senator.

Senator **Ford**. Did not the individual that vetoed it make a serious mistake when the Senate voted 95 to nothing against it? Was he just doing it for imagery? Surely he had enough communications from the Senate to know that it was going to be overwhelmingly defeated. Was he trying to do Mr. Hatfield a favor?

Senator **Hatfield**. It was not an appropriation bill.

Senator Ford. Well, it was a project, was it not, according to what he just said? It was probably a water project for the West.

I just wanted to know. Should not a President have known that he was going to get beaten 95 to nothing? You would not have vetoed that particular item for a distinguished chairman of your party, that sort of thing, if you were going to get defeated 95 to nothing. I do not think you would embarrass yourself or him by doing that.

Would not that line-item veto have been wrong? Would it have been wrong at that time?

Senator Mattingly. Well, the President sent his veto message back outlining his objections, citing precedent and other reasons and the congress considered his message, disagreed with it, and override the veto.

That is a good example of a rather minor matter, of particular interest to only very few senators, being able to withstand a veto and be passed on its merits.

We have eroded the process because with the Budget Committee, the authorizing committees, and the appropriation process, we end up bumping up against the end of the fiscal year and removing the President's ability to exercise a veto.

Senator Ford. Well, Senator, let me ask you this. If the President believes it is necessary to have item flexibility in the budget process, why did he insist on a "package" for this budget deficit plan, no changes, no amendments, no nothing? Why did he ask for that?

Senator Mattingly. Well, it is probably a smart way to try to get it through the Congress without any tax increases.

Senator Ford. Well, I understand that, but you did not answer my question. You are trying to say no increase in taxes. That is fine. Let us reduce the mailing. Let us do those sorts of things.

But the question is why did he send it up here for a vote as a package, and no changes.

Senator Mattingly. Probably he wanted no amendments; but it wasn't an appropriation bill.

Senator Ford. Well, you cannot answer my question then?

Senator Mattingly. I'll let the President speak for himself.

Senator Ford. Well, it is relevant if he is going to be the individual that will be exercising the line-item veto, and we are talking about the present. We are not talking about anything in the future.

Senator Mattingly. If it works, hopefully it would be extended beyond 2 years.

Senator Ford. And if this President does well under it and we make it permanent, then the next President may be off base. "There is no way that the President can be out of trouble under line-item veto, in my opinion, without creating political furor unless we have a balanced budget submitted, and if we want a balanced budget and this is the way, we are getting form ahead of substance."

Senator Mattingly. Of course, it may be that you want to have it renewed on a 2-year basis and never make it permanent. That is a possibility.

Senator Ford. Well, we get back to the same process we are in now. We will be arguing over whether we have it or we do not have it and we will get another continuing resolution. We never finish the budget process around here anyhow. So you are going to have a continuing resolution that we have had for the last 5 or 6 years that does not say anything permanent as a decision by Congress on any particular item.

So if you want to get down to it, we have never given the President but one time since the budget process has been in effect a full set of budget resolutions and regular appropriations bills. It has been basically a continuing resolution.

So the President is going to have a line-item veto on a continuing resolution that Congress never made a full decision on. That is exactly what we are saying here.

Senator MATTINGLY. Well, let me say that some people have been saying that the line-item veto would be ineffective, and my answer to that is if it is going to be ineffective, why be afraid of it? Why not pass it? Nobody should really fear a trial of it; I really believe it will restore some discipline.

We all know that there are too many wasteful items included in bills and I think that we need some——

Senator FORD. That is a matter of opinion.

Senator MATTINGLY. I understand that.

Senator FORD. And that is what we are getting into on a line-item veto without a balanced budget.

Senator MATTINGLY. A trial period will let us see if it will work. I think this is a tool that really needs to be tried, and that is one reason why I was reluctant at this time to try and amend the Constitution.

It is better to give this a trial and not make it part of the Constitution at this time. We really don't have anything to be afraid of.

If it works, you all might even like it.

Senator FORD. We hear a lot about balance the budget. The President sends us the most unbalanced budget we have ever had. He turns right around and wants a constitutional amendment to balance the budget. That makes a lot of sense.

The CHAIRMAN. I am wondering if the Senator from Georgia can stay with us. The Senator from Oregon has got an immutable commitment for 11 o'clock.

Senator MATTINGLY. Would you like me to stay?

The CHAIRMAN. Yes, because we have a few other Senators who, I am sure, would like very much to ask you some questions. If it is agreeable to the other members of the committee, I would like to accommodate our colleague from Oregon. I will have him make his statement, and then we will resume the questioning of the Senator from Georgia.

Let me ask the Senator from Georgia if he would like to join us on the bench here.

Senator SIMON. Come over here on the Democratic side. [Laughter.]

## TESTIMONY OF HON. MARK O. HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator Hatfield. Mr. Chairman and members, I am grateful for the accommodation for another program schedule. I appreciate the opportunity to testify here today.

Mr. Chairman, my position on the line-item veto is no secret. I am unalterably opposed to it in any form. Legislation to grant the President authority to veto items in appropriation bills is proffered as a tool to eliminate extravagant and wasteful Government spending.

It is a simple solution on its face but it is very wrong. I hope this committee, in considering this legislation, will look beyond the immediate public appeal and all of the public relations aspects of this proposal and recognize that, if enacted, it will have serious institutional and political impacts.

At the outset, it should be made clear in any discussion of the line-item veto that it is not a mechanism to achieve meaningful reductions in the Federal deficit. Let me repeat that.

It is totally inaccurate to portray this proposal as a meaningful reduction tool in the Federal deficit problem. A look at the composition of Federal spending indicates otherwise, and I can only go by S. 43, not what may be devised as a result of hearings and the correction of the obvious faults in S. 43. But, as now stated and before this committee, S. 43 is not such a tool. As proposed, line-item veto authority would apply only to individual items in appropriations bills—let us read this language very closely—for it would not be used on revenue measures. It also would not be applied against the largest and fastest growing portions of the budget, such as permanently funded entitlement spending and other mandatory costs such as interest on the Federal debt. These items account for half the budget and are not funded in appropriation bills.

Of the remaining half of the budget subject to appropriation, more than half goes for defense. I doubt very much that the current Reagan administration, even though committed to spending restraint, would exercise this grant of power much on defense or foreign aid items.

Nor could this veto be used to reduce entitlements funded in annual appropriation acts—items which cannot be reduced or eliminated without changes in the substantive law. That cannot be done in this process of appropriations.

Now, what it boils down to is less than 15 percent of the budget, the nondefense domestic discretionary appropriation items. The Chairman used a figure a while ago of 11 percent. I am perhaps more liberal to say the outside limit it could be boiled down to is not more than 15 percent. Thus, a range of 11 to 15 percent of the total budget would be affected by a line-item veto, and that means the nondefense domestic discretionary appropriation items.

These activities include education assistance, community and regional development, law enforcement, environmental protection, health research, energy development, agricultural aid, and a host of other vital Federal responsibilities.

This small fraction of the Federal budget—the target of the line-item veto, and Mr. Chairman, I cannot underscore this too strongly, the sole area of the budget that this bill, if enacted, would apply to—is the only part of the budget that has been declining by the action of Congress in recent years, falling from $97.3 billion in fiscal year 1980 to $65 billion in fiscal year 1985 in 1972 constant dollars, a 33-percent reduction.

The CHAIRMAN. And that part of the budget is discretionary and domestic budget.

Senator HATFIELD. That is correct.

Now, it baffles me that we are considering a proposal that seeks to control the only portion of the budget we have been able to control—not only control but reduce—in recent years. This is not the path to meaningful deficit reduction. Indeed, we could eliminate all the non-defense domestic discretionary appropriation items and the deficit would still exceed $100 billion in fiscal year 1986.

Much has been made of the fact that 43 States currently grant their Governors some form of line-item veto authority. The argument here is that what works for the States ought to work for the Federal Government.

I think we should be very careful to consider the differences between State governments and the Federal Government. Notable differences include the structure of State budgets, the fact that State legislatures meet only for a limited portion of the year in many instances, and that most States operate under a balanced budget requirement.

The most obvious difference, however, is simply the size and the power and the scope of the Federal Government. The greater the scope and reach of the power, the more critical it is that such power be held in check, balanced between the three coequal branches of Government.

I know we are all history buffs to some degree, but I would be very amused to think of the possibility of a Republican sponsorship of this kind of a proposal under the period of Roosevelt and the New Deal or even Truman and the Fair Deal or those other periods of time where the Republican cry was there is too much centralization of power in the hands of the Chief Executive, but that is neither here nor there.

Philosophical considerations aside, the practical matter is that the line-item veto may not work in the States either, and let us challenge that assumption. The February 1985 Annual Report of the President's Council of Economic Advisers states, and let me quote: "Approval of a line-item veto may not have a substantial effect on total Federal expenditure. The experience of the States indicates that the per capita spending is somewhat higher in States where the governor has the authority for a line-item veto, even when corrected for the major conditions that affect the distribution of spending among States."

To be blunt, Mr. Chairman, this proposal has little to do with spending reduction. It has everything to do with a balance of power in our Government. This proposal represents a significant grant of power and passing of responsibility to the Chief Executive at the expense of the legislative branch, and there are no sound reasons why this shift in power should occur.

First, the Congress has acted responsibly on appropriations. Total discretionary funds appropriated by the Congress have remained very close to the administration's requested levels.

Let me give you a little visual aid. We hear about this great spendthrift Congress and all the other things every time the President gets on TV. Let me show you here precisely what has happened since 1980, because, as you know, this administration had an impact on the last part of the Carter budget of 1980, and then we will see whether this Congress has had a "free-wheeling" attitude in spending.

[Presentation of charts]

The green represents what the President has requested. The blue represents what was enacted by the Congress. In that 6-year period, you will find that in 3 of those years the Congress underappropriated the President's requested level, and you find that in 3 years the Congress overappropriated the President's request level.

But in this 6-year period of the Reagan administration, fiscal years 1980, 1981, 1982, 1983, 1984, and 1985, the grand total for discretionary appropriations is the President requested $2,249.2 billion, and the Congress appropriated $2,237.2 billion.

In other words, the Congress is slightly less than 1 percent in that accumulated period under what the President requested. It is the evidence of responsible appropriations actions by the Congress, and again, I refer back to that part of the budget which has declined in this period of time that this line-item veto is targeted for.

Second, there is a misconception that this grant of power will allow the President to veto spending for a certain project or activity in one area of the country or another and that it will allow the President to remove funding for the so-called "pork-barrel" projects. This could occur only on a very, very limited basis. So let me explain again what the procedure of the Congress is.

If, for example, the President opposed funding for an Army construction project located in a particular State, he could line-item veto the total appropriation for the "Military Construction, Army" account in order to get to the specific project. That would deny funding for all Army construction projects, not just one, all of them. But it would not simply delete the objectionable project.

The same is true for a single water construction project, a particular Park Service land acquisition, and a host of other individual projects and activities. It would be necessary under this bill to veto the entire appropriation for the account to turn down one minute detail in it, if that is really what he was aiming at. And that is only if the account fits the definition of an "item."

Well, let me point out again, as I did earlier, that most of the water projects, the reclamation projects, and these individual projects are not in the bill. They are in the report on the bill, and they refer back to the account in the bill. So let us get it clear in our minds that the line-item veto, as proposed, does not get down to those minute details as it is supposed to, and I later will tell you how the President already has the power to do that. We do not have to add more power.

What would result from this proposal is regular appropriation bills being enrolled as perhaps as many as a hundred or so separate bills as has already been pointed out in the testimony. General appropriation measures might be converted into literally hundreds of separate bills that would have to go to the President's desk.

Talking about the President being surprised now with appropriation measures, and I will reject that thesis as well. The President would be swamped with paper and we would have difficulty keeping track of things.

In addition, it remains unclear to me what the application of this proposal would be if a bill or a conference report is incorporated by reference—the bill does not address this—into a general appropriation measure. We should equally be concerned that legislative intent may be completely overridden when items intentionally linked and sequenced together are separately enrolled, and we do this often in the appropriations process.

Third, this idea that the President somehow is just down there faced with the proposition that he has to adopt everything or reject everything and it is all a big surprise for him and he cannot comprehend the magnitude of these appropriation bills is nonsense. The President has current impoundment powers to delete funding for subaccount details of an appropriation bill considered to be wasteful or unnecessary.

Proposals to defer or rescind previously-appropriated funds are submitted by the President. We are acting on those all the time. They get to those items in the report accompanying the appropriation bill. They go beyond the accounts. They get into the subaccounts and into the references within the report, and the President sends up rescissions and deferrals time and time again on those very minute items that he could not get at under this bill, S. 43.

The CHAIRMAN. And the only difference otherwise is that it takes a simple majority to deal with a rescission and it would take a two-thirds majority to deal with a veto.

Senator HATFIELD. That is correct.

And you might also ask for a little track record of his rescissions and deferrals even on a majority vote. That would be an interesting little treatise.

Now, fourth, and last, the President already possesses "de facto" line-item veto authority. This is another thing we ought to be aware of and I know people who do not serve on the Appropriations Committee may not be as aware of these procedures, but let me use this opportunity for review.

The President today possesses a "de facto" line-item veto authority, and I will illustrate. The President, through his aides, is in close touch with each bill, each of the 13 bills of the Appropriations Committee, as it progresses through the legislative process.

We are in daily contact with Mr. Stockman or his aides or the White House aides or the Cabinet people or the liaison people, and they are making known their opposition or they are making known their support and they are exercising a great deal of influence over the bill's particulars before it is ever sent to the President or even to the Senate floor.

I will cite some examples. The jobs bill which I happened to author as a supplemental for fiscal year 1983 is a case in point. A provision was incorporated in that bill to accelerate the fourth quarter payment of general revenue-sharing funds. It was dropped from the bill because of a threatened Presidential veto. Mr. Stockman said if you incorporate that in the bill, we will veto it, despite the fact that there was strong sentiment for the proposal in both the House and the Senate.

Another example is the continuing resolution of 1985. You remember we were hung up late on that continuing resolution because of disagreement on the Bonneville lock as a water project for Oregon, Gallipolis Dam in Ohio and a few of the other water resource projects that had been put in by the House and the Senate, and we took them out as a final bow and "tip of the hat" to the White House because they said you keep them in and we will veto the entire bill. "De facto" line-item veto authority was exercised in those actions, and I could cite you other such examples.

The argument is no longer valid that the President must approve appropriation bills and swallow the good with the bad, or permit the Government to shut down either—that's another argument that was used here today.

Short funding extensions are traditionally granted to allow time to negotiate out an acceptable measure, and we have done that, year after year. As you well know, we have extended those deadlines 3 days, 5 days, 2 days, in order that the President and we might work out those differences.

The veto authority the President now possesses under the Constitution is a powerful tool. To enhance a President's veto authority further with the grant of an item veto could be to hand a President a powerful political weapon. It could be used to dictate Presidential priorities and thwart the will of the Congress.

Mr. Chairman, I am not appearing before you today as the chairman of the Senate Appropriations Committee out to protect the committee's turf. The objections I raise to the line-item veto proposal are ones I believe should be of grave concern to this committee and to all the Members of the Congress.

The line-item veto will not lead to significant deficit reductions. In fact, it may not result in any budget savings.

What it will do is unnecessarily and inadvisably change the relationship of the President and the Congress. The separation of powers and the balance of power are coveted principles embodied in our Constitution, and I see no need to change them.

It is tempting to support a mechanism to shift the blame and responsibility from our shoulders and go back home and issue press statements and tell our constituents that we have just given the President a tool to eliminate wasteful spending. That will not make it happen.

It is the responsibility of the Congress to spend funds and to raise revenue. We may need to do a better job, but relinquishing this responsibility is the wrong answer and shifting it to the President's shoulders and to the executive branch of Government is the wrong answer—it is a cop-out; it is not facing up to our own responsibilities of doing a better job than perhaps we now are now doing.

The line-item veto to me is a totally wrong solution.

Now, since I have been rather ambivalent on this issue, you may want to ask some questions.

[The prepared statement to Senator HATFIELD, and other items submitted, follow:]

## PREPARED STATEMENT OF SENATOR MARK O. HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Mr. Chairman, I appreciate the opportunity to testify before the Committee today. My position on the line-item veto is no secret. I am unalterably opposed to it in any form.

Legislation to grant the President authority to veto items in appropriation bills is proffered as a tool to eliminate extravagant and wasteful government spending. It is a simple solution on its face, but wrong. I hope this Committee, in considering this legislation, will look beyond the immediate public appeal of this proposition. if enacted, it will have serious institutional and political impacts.

At the outset, it should be made clear in any discussion of the line-item veto that it is not a mechanism to achieve meaningful reductions in the Federal deficit. A look at the composition of Federal spending indicates otherwise. As proposed, line-item veto authority would apply only to individual items in appropriation bills. It would not be used on revenue measures. It also would not be applied against the largest and fastest growing portions of the budget, such as permanently-funded entitlement spending and other mandatory costs such as interest on the Federal debt. These items account for half the budget and are not funded in appropriation bills.

Of the remaining half of the budget subject to appropriation, more than half goes for defense. I doubt very much that the current administration, even though committed to spending restraint, would exercise this grant of power much on defense or foreign aid items. Nor could this veto be used to reduce entitlements funded in annual appropriation acts—items which cannot be reduced or eliminated without changes in substantive law.

What it boils down to is less than 15 percent of the budget, the non-defense domestic discretionary appropriation items. These activities include education assistance, community and regional development, law enforcement, environmental protection, health research, energy development, agriculture aid, and a host of other vital Federal responsibilities.

This small fraction of the Federal budget—the target of the line-item veto—has actually been the only declining portion of the Federal budget in recent years, falling from $97.3 billion in fiscal year 1980 to $65.0 billion in fiscal year 1985 in 1972 constant dollars, a 33 percent reduction.

It baffles me that we are considering a proposal that seeks to control the only portion of the budget we have been able to control—not only control, but reduce—in recent years. This is not the path to meaningful deficit reduction. Indeed, we could eliminate all non-defense domestic discretionary appropriation items and the deficit would still exceed $100 billion in fiscal year 1986.

Much has been made of the fact that 43 states currently grant their governors some form of line-item veto authority. The argument here is that what works for states ought to work for the Federal government.

We should be careful to consider the differences between State governments and the Federal government. Notable differences include the structure of State budgets, the fact that State legislatures meet only for a limited portion of the year, and that most states operate under a balanced budget requirement. The most obvious difference, however, is simply the size and power of the Federal government. The greater the scope and reach of the power, the more critical it is that such power be held in check, balanced between the three, co-equal, branches of government.

Philosophical considerations aside, the practical matter is that the line-item veto may not work in the states either. The February 1985 Annual Report of the President's Council of Economic Advisors states: "Approval of line-item veto may not have a substantial effect on total Federal expenditure. The experience of the States indicates that per capita spending is somewhat higher in States where the Governor has the authority for line-item veto, even when corrected for the major conditions that affect the distribution of spending among States."

To be blunt, Mr. Chairman, this proposal has little to do with spending reduction. It has everything to do with the balance of power in our government. This proposal represents a significant grant of power and passing of responsibility to the Chief Executive at the expense of the Legislative Branch, and there are no sound reasons why this shift in power should occur.

First, the Congress has acted responsibly on appropriations. Total funds appropriated by the Congress have remained very close to the Administration's requested levels. Enacted appropriations over the past six years have been under the President's request by slightly less than one percent. This is not evidence of the Congress wielding a "free-wheeling" hand in spending federal resources. It is evidence of responsible appropriations action by the Congress.

Second, there is a misconception that this grant of power will allow the President to veto spending for a certain project or activity in one area of the country or another; that it will allow the President to remove funding for so-called "pork-barrel" projects. This could occur only on a very limited basis. If, for example, the President opposed funding for an Army construction project located in a particular state, he could line-item veto the total appropriation for the "military Construction, Army" account. That would deny funding for all Army construction projects, but it would not simply delete the objectionable project. The same is true for a single water construction project, a particular Park Service land acquisition, and a host of other individual projects and activities. It would be necessary to veto the entire appropriation for the account to turn down one minute detail of it. And, that is only if the account fits the definition of an "item."

What would result is regular appropriation bills being enrolled as perhaps as many as a hundred or so separate bills. General appropriation measures might be converted into literally hundreds of separate bills. The President would be swamped with paper and we would have difficulty keeping track of things. In addition, it remains unclear to me what the application of this proposal would be if a bill or conference report is incorporated by reference into a general appropriation measure. We should equally be concerned that legislative intent may be completely overridden when items intentionally linked and sequenced together are separately enrolled.

Third, the President can use his current impoundment powers to delete funding for subaccount details considered to be wasteful or unnecessary. Proposals to defer or rescind funding for these items can be made by the President, getting to a level of detail the line-item veto cannot.

Fourth, the President already possesses "de facto" line-item veto authority. The President, through his aides, is in close touch with each bill as it progresses through the legislative process, making his opposition known and exercising a great deal of influence over the bill's particulars before it is ever sent to him for signature. The jobs bill supplemental of fiscal year 1983 is a case in point. A provision to accelerate the fourth-quarter payment of general revenue sharing funds was dropped from the bill because of a threatened Presidential veto, despite the fact that there was strong sentiment for the proposal in both the House and Senate. The argument is no longer valid that the President must approve appropriation bills and swallow the good with the bad or permit the government to shut down. Short funding extensions are traditionally granted to allow time to negotiate out an acceptable measure.

The veto authority the President now possesses under the Constitution is a powerful tool. To enhance a President's veto authority further with the grant of an item veto could be to hand a President a powerful political weapon. It could be used to dictate Presidential priorities and thwart the will of the Congress.

Mr. Chairman, I am not appearing before you today as the Chairman of the Senate Appropriations Committee—out to protect the Committee's turf. The objections I raise to the line-item veto proposal are ones I believe should be of grave concern to this Committee and to all members of the Congress.

The item veto will not lead to significant deficit reduction. It may not result in any budget savings. What it will do is unnecessarily and inadvisably change the relationship of the President and the Congress. The separation of powers and the balance of power are coveted principles embodied in our Constitution. I see no need to change them.

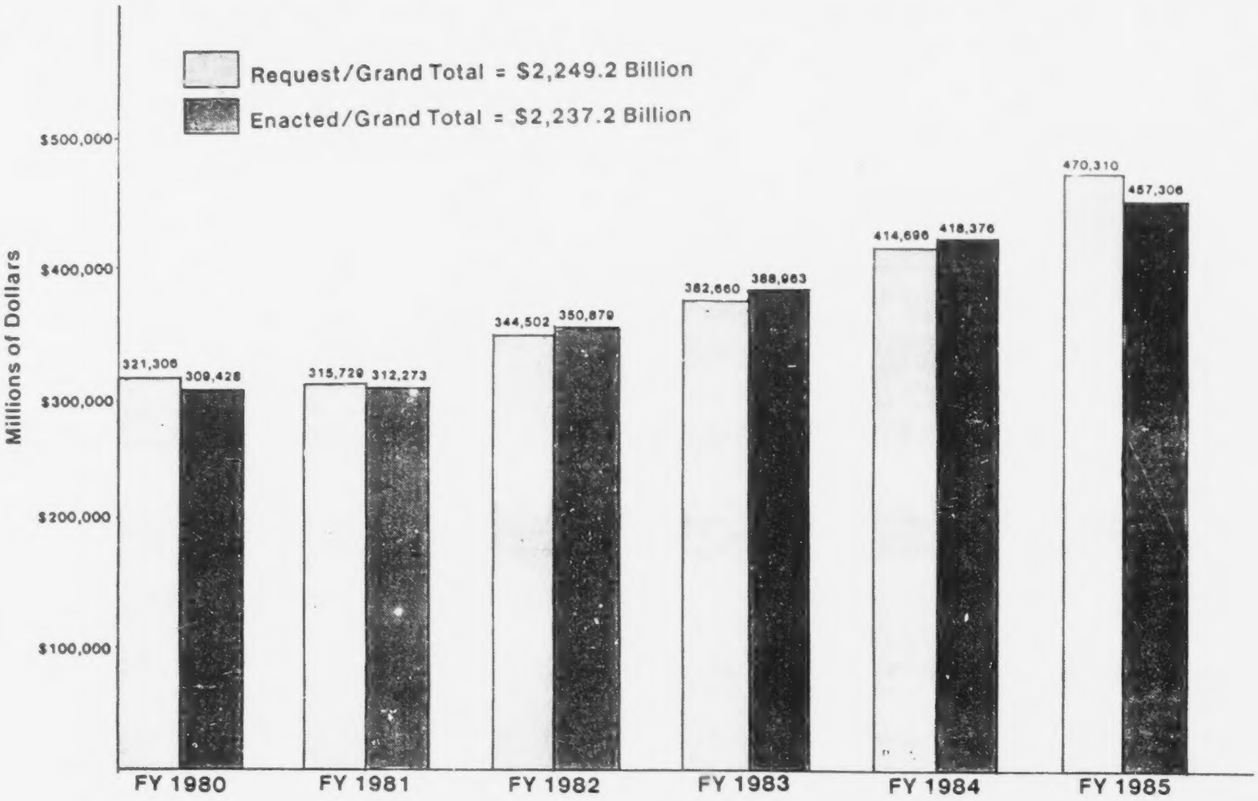
It is tempting to support a mechanism to shift the blame and responsibility from our shoulders and go back home and tell our constituents that we have just given the President a tool to eliminate wasteful spending. That will not make it happen. It is the responsibility of the Congress to spend funds and to raise revenue. We may need to do a better job, but relinquishing this responsibility is the wrong answer and the line-item veto is the wrong solution.

# DISCRETIONARY APPROPRIATIONS: HISTORICAL TABLES

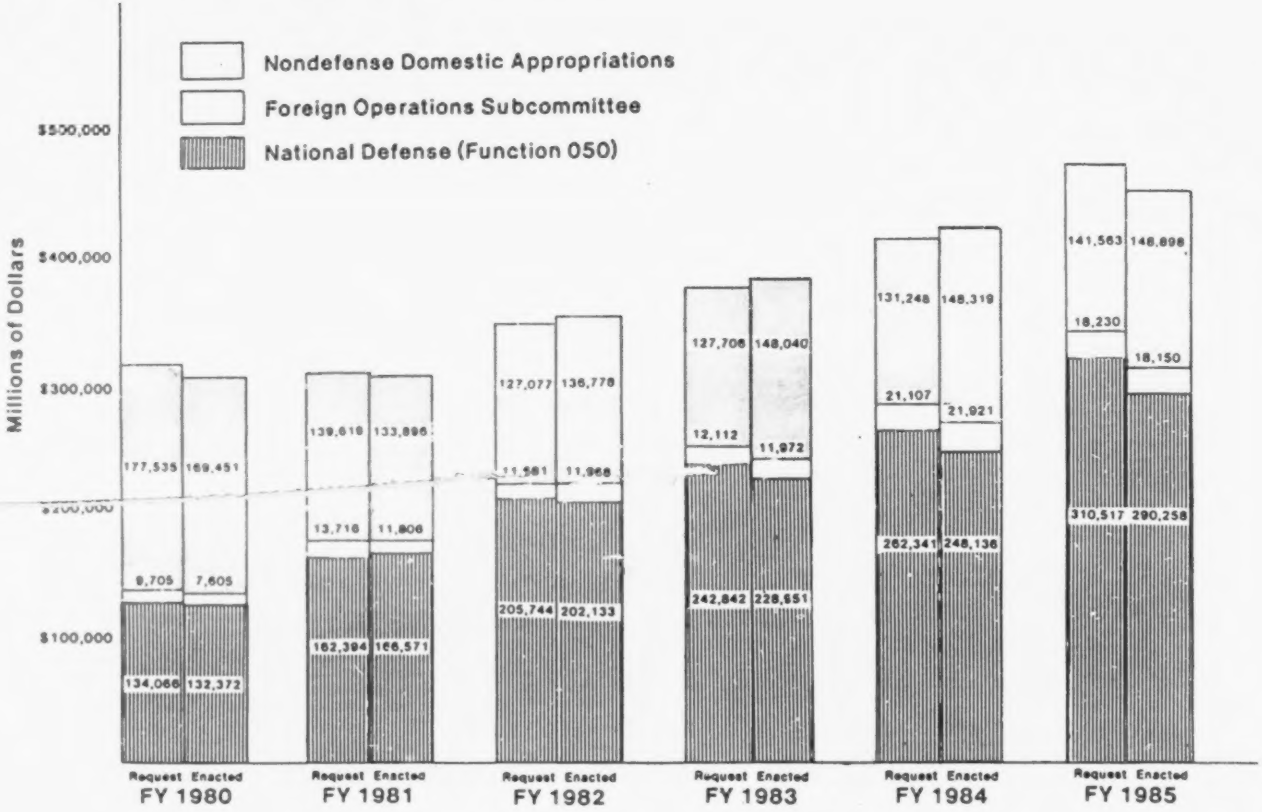
Committee on Appropriations
United States Senate

(Table with backup detail appears on page S 1003 of the February 5, 1985, _Congressional Record_.)

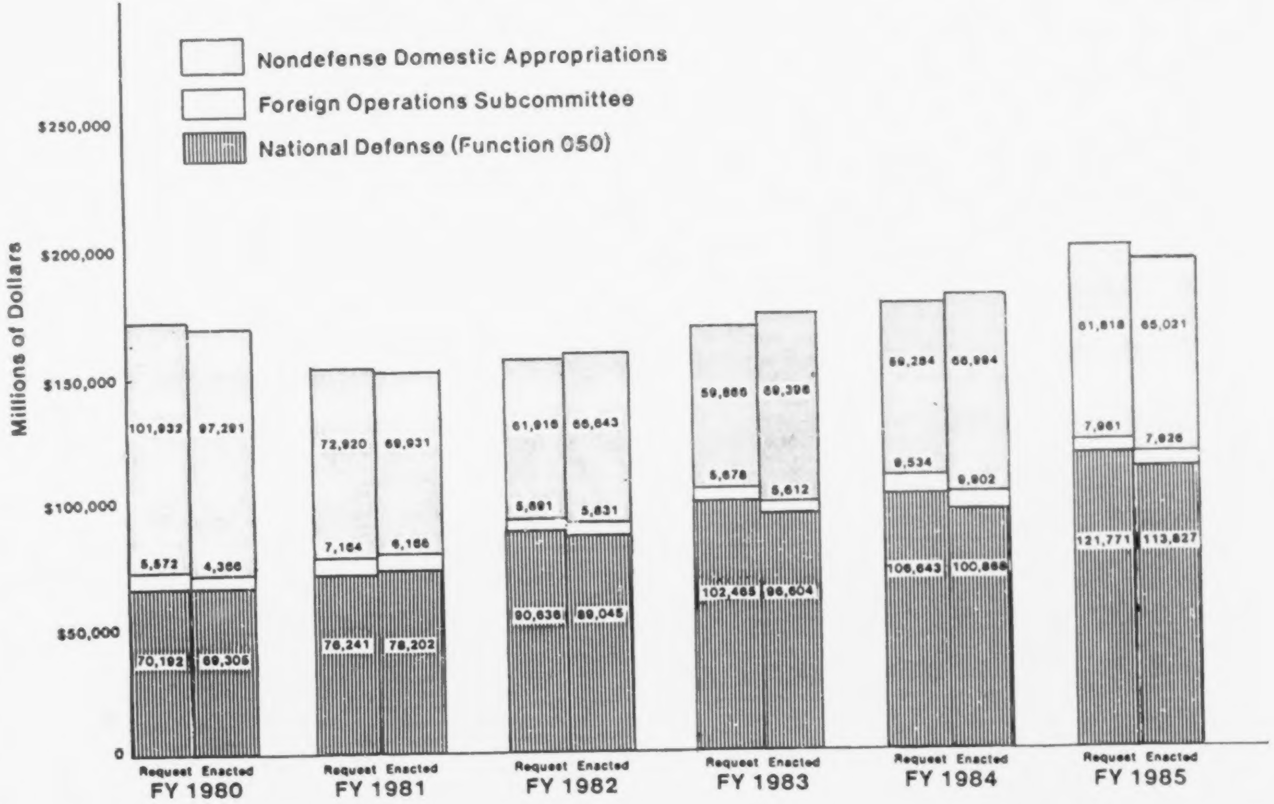
## APPROPRIATION TOTALS



# APPROPRIATION TOTALS - nominal dollars



## APPROPRIATION TOTALS - Constant 1972 Dollars



Senator **Mattingly**. Do you have a fixed opinion on it yet?

The **Chairman**. First of all, let me adopt the suggestion of the Senator from Oregon that we look at the rescission record, and I will direct the staff of the Rules Committee to prepare a record of rescissions during a current Administration—and without objection we will make that a part of the record of this hearing.

[The material referred to above follows:]

### TABLE 1-A.—RESCISSIONS, FISCAL YEARS 1975-85

[Dollars in thousands]

| | Number | Amount proposed | Amount approved | Amount rescinded (percent) | Proposals approved (wholly or in part) (present) |
|---|---|---|---|---|---|
| 1975 | 91 | $3,328,500 | $391,295 | 12 | 43 |
| 1976 [1] | 50 | 3,608,363 | 138,331 | 4 | 14 |
| 1977 | 21 | 1,835,602 | 1,271,040 | 69 | 48 |
| 1978 | 8 | 644,055 | 55,255 | 9 | 38 |
| 1979 | 11 | 908,692 | 723,609 | 80 | 80 |
| 1980 | 59 | 1,618,061 | 778,127 | 48 | 58 |
| 1981 | 208 | 16,204,936 | 14,509,878 | 90 | 67 |
| 1982 | 34 | 9,484,941 | 5,974,966 | 63 | 21 |
| 1983 | 21 | 1,569,015 | 0 | 0 | 0 |
| 1984 | 12 | 666,411 | 58,000 | 9 | 17 |
| 1985 | 242 | 1,843,315 | 0 | [1] 0 | 0 |

[1] $37,402,000 remained before Congress for approval.

Note: Data for fiscal year 1984 as of May 7, 1984.

Source: Vital Statistics on Congress, 1984-1985 Edition (American Enterprise Institute, 1984); tabulated from House Appropriations Committee data. Fiscal 1985 data taken from H. Doc. No. 99-77 (June 10, 1985).

### TABLE 1-B.—DEFERRALS, FISCAL YEARS 1975-85

[Dollars in thousands]

| | Number | Amount proposed | Amount disapproved | Number of deferrals disapproved | Amount disapproved (percent | Deferrals disapproved (percent) |
|---|---|---|---|---|---|---|
| 1975 | 159 | $24,574,236 | $9,318,217 | 16 | 38 | 10 |
| 1976 [1] | 119 | 9,209,780 | 393,081 | [2] 24 | 4 | 20 |
| 1977 | 68 | 6,831,194 | 25,600 | 3 | 0.4 | 4 |
| 1978 | 66 | 4,910,114 | 69,531 | 6 | 1 | 9 |
| 1979 | 70 | 4,696,056 | 13,852 | 2 | 0.3 | 3 |
| 1980 | 73 | 9,846,235 | 3,663,448 | 2 | 37 | 3 |
| 1981 | 119 | 7,535,493 | 367,359 | 15 | 5 | 13 |
| 1982 | 258 | 7,562,078 | 386,347 | 15 | 5 | 6 |
| 1983 | 86 | 9,957,186 | 4,119,590 | 16 | 41 | 19 |
| 1984 | 59 | 4,443,025 | 2,050 | 1 | 0.0 | 2 |
| 1985 | 71 | 14,872,622 | 0 | 0 | 0.0 | 0 |

[1] Fiscal 1976 data include the transition quarter. A proposal to rescind or defer funds in both fiscal 1976 and the transition quarter is counted as a single proposal.

[2] Two fiscal 1976 deferrals that were disapproved by both the House and the Senate are counted here once.

Note: Data for fiscal year 1984 as of May 7, 1984.

Source: Vital Statistics on Congress, 1984-1985 Edition (American Enterprise Institute, 1984); tabulated from House Appropriations Committee data. Fiscal year 1985 data taken from H. Doc. No. 99-77 (June 10, 1985).

### TABLE II.—*Budget deficits submitted by Carter and Reagan*

| | |
|---|---|
| By Carter: | |
| Fiscal year: | *Billions* |
| 1978 | [1] $57.75 |
| 1979 | 60.6 |

| | |
|---|---|
| 1980 | 29.0 |
| 1981 | 15.8 |
| By Reagan: | |
| Fiscal year: | |
| 1982 | [2] 45.0 |
| 1983 | 91.5 |
| 1984 | 188.8 |
| 1985 | 180.4 |
| 1986 | 180.0 |

[1] February 1977 revisions to Ford's final budget.

[2] February 18, 1981 revisions to Carter's final budget.

TABLE III.—RELATIVELY CONTROLLABLE NON-DEFENSE OUTLAYS IN RELATION TO OTHER OUTLAYS AND TO TOTAL OUTLAYS

[Dollars in millions, unadjusted for offsetting receipts]

| | 1984 | | 1985 | | 1986 | |
|---|---|---|---|---|---|---|
| | Amount | Percent of total | Amount | Percent of total | Amount | Percent of total |
| Outlays | $1,019.8 | 100.0 | $1,147.3 | 100.0 | $1,166.3 | 100.0 |
| Uncontrollable: By program | 583.6 | 57.2 | 655.8 | 57.2 | 673.8 | 57.8 |
| Prior year obligations: | | | | | | |
| Defense | 79.5 | 7.8 | 95.2 | 8.3 | 108.2 | 9.4 |
| Nondefense | 67.9 | 6.7 | 76.2 | 6.7 | 78.2 | 6.7 |
| Total, uncontrollable | 731.0 | 71.7 | 826.5 | 72.0 | 860.4 | 73.8 |
| Controllable: | | | | | | |
| Defense | 148.5 | 14.6 | 162.1 | 14.1 | 176.8 | 15.2 |
| Nondefense | 140.3 | 13.8 | 158.7 | 13.8 | 129.1 | 11.1 |
| Total, controllable | 288.8 | 28.3 | 320.8 | 28.0 | 305.9 | 26.2 |

Source: President Reagan's January 1985 budget recommendation.

The CHAIRMAN. The Senator refers to the constitutional process. If the Congress is wrong—and we frequently are—here is accountability. If we vote for too much expenditure, we answer for that at the next election. Who in the Senator's experience is likely to be accountable for the advice that is given to the President on a line-item veto?

Senator HATFIELD. None of them are accountable in terms of the public.

The CHAIRMAN. Mr. Stockman?

Senator HATFIELD. No; he's not elected.

The CHAIRMAN. Any of his assistants?

Senator HATFIELD. None.

The CHAIRMAN. As a practical matter, aren't these the people who will be highly influential in that decision?

Senator HATFIELD. Correct.

The CHAIRMAN. So we are really moving away from a system of representative government.

Senator HATFIELD. We are centralizing more and more political power in the hands of the Chief Executive, in the executive branch of Government.

The CHAIRMAN. Senator Ford.

Senator FORD. I think it's hard to ask the distinguished Senator from Oregon a question, because I think he has eloquently given his position.

It goes back to the so-called legislative veto. We already have the authority as Congress to do that. It was given to us in the beginning. We can change the law any time we want to.

But we want to find somebody that's a whipping boy, and a whipping boy became those whom we appointed and set up and created ourselves. And here we are trying to make a whipping boy out of ourselves, and maybe we ought to just turn around and do a better job.

I was very pleased to see the Senator from Oregon show that the Congress has been on the decline as it relates to certain portions of the budget in our budget process. And we hear a lot of wailing and gnashing of teeth today by the administration as relates to a balanced budget, but I haven't seen one sent to us yet.

And I couldn't even get an amendment to the bill saying that if the President couldn't submit a balanced budget, to cover that budget sent to Congress with a letter stating why he couldn't send us a balanced budget.

So all in all—and I go back to the chairman's statement that the distinguished Senator from Georgia said the taxpayers would rejoice if we save $1 million by this process. The chairman and I have bled considerably when we revamp the committees, and I think the distinguished Senator from Oregon remembers that—he was on the committee; we saved $4 million in that process, and I don't remember receiving a letter of rejoicing from my constituency for doing that. Maybe I didn't send out a newsletter patting myself on the back, to create some more mail—but I'm not in the habit of doing that.

I think the distinguished Senator from Oregon has made an eloquent case.

Senator HATFIELD. Well, Mr. Chairman, if I could respond for just 1 minute—you know, I think we ought to also go back and review the record of the impoundment legislation, and then the antiimpoundment legislation. Talking about experimenting—we have heard the request here: Let's try something, let's try it. Let's go back and review the record of our trial on the impoundment. There was a question involving the President's ability to withhold spending that had been appropriated by the Congress. And under Mr. Nixon it reached a point where the Congress said, hey, wait a minute, you've gone too far, and now we are going to have to enact antiimpoundment legislation.

We have been down this road, we have been down this primrose path—don't lead us down this primrose path again, as I recall the Senator from Illinois once saying to the Republican National Convention.

The CHAIRMAN. The Senator from Virginia.

Senator WARNER. Mr. Chairman, I find myself on opposite sides with my distinguished colleague here from Oregon. And I first want to say that a great deal of personal attribute is owing the Senator from Georgia, for he set out the very first day that he was sent by the people of Georgia to the Congress of the United States as making this one of his principal crusades—and you've come a long way. With 46 cosponsors, you are spoiling for a good fight—and I think you are going to win it.

What puzzles me is that I have sat here this morning and I have not heard one single reference to the fact that 43 States have a comparable system.

Senator **Hatfield**. I'd be very happy to repeat that testimony.

Senator **Warner**. Well, I knew I'd get a little rise out of both of you, because you were chief executives—and Kentucky has adopted one, it is my understanding—I am not sure whether it was in effect when you were——

Senator **Ford**. Well, you see, the difference in what we are doing here and what we are doing there is that we have to submit a balanced budget, and a line-item veto under a balanced budget doesn't give rise to political speculation and consternation among the troops.

So if you don't submit a balanced budget, then you can start picking and choosing, and when you listen to the Senator as it relates to appropriations, you will veto the total military construction budget, of which Virginia gets a pretty good share.

Senator **Warner**. Yes.

Senator **Ford**. A very, very good share. And I would suspect that some of the military construction that came out of Senator Mattingly's subcommittee would warm the cockles of his heart.

But there is no balanced budget here, and basically you would be picking and choosing, and you might cancel all of your military construction.

Senator **Hatfield**. There are three pages of my testimony, Senator, that had to do with that 43 States, and I referred also to——

Senator **Warner**. I stepped out of the room.

Senator **Hatfield**. There was a study made, too, by the President's Economic Council which I referred to that those States which had it had on a per capita spending at a higher level, in considering even the distribution systems among those.

So it's not always even those States that have such, have they been able to prove again my point that it's a deficit-reduction tool, or a meaningful one.

Senator **Warner**. Well, I still think we are going to have a marvelous debate, and I think those in opposition, my distinguished collegue from Georgia, are fearful of losing some power in this body of the Congress.

Senator **Hatfield**. Indeed, that's very true, because the Constitution provided three coequal branches of the Government.

Senator **Warner**. That's correct.

Senator **Hatfield**. And we saw so much of that concentration of power under the Democrats in the New Deal period that I just don't want to see the Republicans accelerate that.

Senator **Warner**. And that same concentration of power is producing the $200-billion deficit because we are the ones that appropriate that money.

Senator **Hatfield**. You weren't in the room when I showed the chart.

Senator **Warner**. Well, I had to step out to another hearing. [Laughter.]

The **Chairman**. Show it again.

Senator **Ford**. Show it again.

Senator **Hatfield**. Here's the record, Senator Warner, just to correct that misunderstanding that exists—and this is the whole period of the Reagan Administration from 1980 through 1985 showing the Congress has appropriated less than the President has asked for in the accumulated period.

Senator **Warner**. Well, we still——

Senator **Ford**. I would suggest to the Senator from Virginia that he read the Senator from Oregon's statement.

Senator **Warner**. I will do that. It was handed to me just as the hearing began, and I didn't have the chance to see it beforehand.

Senator **Hatfield**. I thank the chairman and the committee for accommodating my presentation.

The **Chairman**. I would point out to the Senator from Oregon that he has completed his testimony precisely at the hour of 11.

Now, if the Senator from Georgia would resume so that we could ask just a few more questions.

Senator **Mattingly**. Do you want me to do it from here or go down there?

Senator **Ford**. There's fine.

The **Chairman**. Does the Senator from Virginia have any questions for the Senator from Georgia?

Senator **Mattingly**. I think the Senator from the State of Washington has been waiting quite awhile to testify, and I just wonder if you want to go ahead.

The **Chairman**. I don't want to foreclose Members of the committee from questions.

Senator **Mattingly**. Well, I've got a lot of questions I would like to ask Senator Hatfield, but I think I will probably wait till we get to the floor of the Senate hopefully in order to pose the——

The **Chairman**. The Senator from Virginia has no questions?

Senator **Warner**. No, Mr. Chairman; thank you very much. I have to leave.

Senator **Mattingly**. I just will say one thing—I'm glad that the Senator from Oregon admitted that we could all do a better job in the appropriations process.

The **Chairman**. I don't think there is any doubt of that; it's not subject to debate.

Senator **Mattingly**. That's right; therefore, the line-item veto deserves a trial.

The **Chairman**. Let me just ask one final question.

Senator **Mattingly**. Yes, sir.

The **Chairman**. You said in your earlier testimony that you thought one of the purposes of this proposal would be to apply discipline. And the chart that was produced by the Senator from Oregon does throw some light on that, when the President has requested more money than the Congress has appropriated by some billions of dollars.

So the question really is: who is to apply the discipline?

But how do you respond to the question that was raised by the Senator from Kentucky that that possibility of applying discipline may work if you are operating under a balanced budget? Don't you really raise a question, when your budget is $200 billion in deficit, or even $100 billion in deficit——you raise the question that the President and his advisors will be picking and choosing not on fiscal grounds, but on ideological grounds. For example, the Grace Commission talked about "pork" in the State of Maryland. Well, as far as I can determine, what they were referring to as "pork" that was coming to the State of Maryland was the money to save the Chesapeake Bay. Now, that might be "pork" in the view of the Grace Commission; but it isn't "pork" in my view, it's a necessary investment in the environment, which goes to preserving jobs, preserving economic potential, preserving esthetic values—a very serious investment.

But isn't that the kind of problem you get into if you operate a line-item veto when you are in deficit?

Senator MATTINGLY. No. Now, I want a constitutional amendment to balance the budget and I wish the President would submit a balanced budget—but that's not the point. The point is: that's not what's happening. What do you do if that is not happening? And that is why I am saying that we need to institute some more tools to try to rectify some of the pork barreling, as the Senator from Oregon admitted, that is involved in the appropriations process.

And those who don't want to defend their projects don't have to get up on the Congress, either body, and try to defend it.

Now, he set there and admitted that we need to do a better job in the appropriations process. I think all those statements are leading us to what we are saying, that there is interest involved in the appropriations bills, or pork-barrel projects, that need to be rooted out. And this is a tool that can be used to do that. We have a saying in south Georgia: a hit dog hollers.

That's sort of what I think we are hearing from not all the opponents of it, because some of the opponents do it in respect to their position—but I think a lot of them do it in defense of trying to make certain that the pork stays in the budget process or the appropriations process.

Senator FORD. What is the Senator's definition of "pork"?

Senator MATTINGLY. I think that's something that is not in the national interest.

Senator FORD. What if it's in the State's interest?

Senator MATTINGLY. Well, I think that's in the national interest.

Senator FORD. Well, what is not in the national interest?

Senator MATTINGLY. Well, I can go through my own military construction budget and find things that are not in the national interest that we are going to take out, have taken out, and will continue to take out. I did the same thing when I was chairman of the legislative branch, when the strongest constituency group for anything is in the legislative branch up here, because all the bureaucrats live around the Beltway.

And when you try to freeze that budget, which I did for 2 years, I have never seen as much squirming in my whole life.

And there is—we all know, if we are honest with ourselves, that——

Senator FORD. But that's not an item that the President will veto that you are talking about.

Senator MATTINGLY. I don't think so; I mean, I——

Senator FORD. What you are saying is with the legislative process you've been able to save some money. Well, we saved $4 million in one fell swoop here—and that's in the past. So in the past you save money.

But why in the world do you want to turn a line-item veto over to an individual who is recommending more money than we give him?

Senator MATTINGLY. Then we can override him. That's what we just got through doing last week.

Senator FORD. What I am saying is that he submits requests for more money than we give him. What good, then, would a line-item veto be—he would never exercise it. Because you can't exercise a veto and get more money; you exercise a veto and get less.

Senator MATTINGLY. I guess I'd rather wait to take some of this to the floor, but let me just say that nobody, nobody, who is honest with himself will say that the status quo is a good thing in the process that we have got—and it's not.

And there are cozy arrangements that are in that budget process, appropriations process, that are just, you know-— what tools are we going to use to help root some of those out?

Now, if somebody says something that's hidden back in a nook and cranny is justifiable, they can get up on the floor of the Senate and defend it, if the President has vetoed that particular item.

Senator FORD. We do that now.

Senator MATTINGLY. I don't think there is anything to be afraid of.

And what I see is the President, if we pass the line-item veto, he would have some real—I don't think he is going to be swamped with paper, I think he is going to have some real interesting evening reading.

Senator FORD. Well, he's vetoing projects and programs right now under a process that he can't get to under your bill, as I understand it. He is rescinding projects, and the rescission process is already here, and we either support his rescission or we deny it.

And that happens quite often.

So under your piece of legislation, we can never get to the line-item veto. If the Senator from Oregon is correct—and I haven't heard you say that he is not—that you cannot go down to a military base under the military construction bill; once your item comes out of your committee and it's approved, that becomes a military construction dash army, and if he doesn't want a military installation built in south Georgia, he has to veto the whole military dash army appropriation in order to get to that item.

Senator MATTINGLY. Let me explain to you something about the appropriations process.

Senator FORD. I understand a little bit about it.

Senator MATTINGLY. That some of it—it depends upon how the bill—if it's wrapped in an omnibus bill, or how it's wrapped up, if it comes out individually—some of the bills have come out where they have one item, sometimes they have had as high as 16 items—if the bill was put forward in the early part of the year, he could veto the whole bill, there wouldn't be any problem. That's what they did in the early part of our country, and there wasn't a problem with that.

But now it gets up toward the end. Now, if he does get involved in a military construction bill that supposedly has 16 items in it, he can go in and veto one of the items—and there's nothing wrong with that—and send it back to the Congress. It depends upon how many items would happen to be in that bill. Sometimes they are wrapped in with one item, sometimes they are wrapped in with multiple items.

Senator **Ford**. But you are saying, though, that——.

Senator **Mattingly**. Not a specific project, but he could go down to the army, or whatever——.

Senator **Ford**. Well, you are saying Senator Hatfield is right, he would have to veto the military dash army——.

Senator **Mattingly**. No, I'm not saying that; sometimes he would, sometimes he wouldn't, Senator.

Senator **Ford**. No, no; that's not the question I'm asking.

Senator **Mattingly**. The question you asked is whether he has to veto the whole military construction bill.

Senator **Ford**. Well, if you just have one military construction dash army, and all the items for the next fiscal year are under that, he would have to veto that whole section.

Senator **Mattingly**. You're right.

Senator **Ford**. That's all I wanted. So if there is just one item under there that he doesn't like, he can veto that and be satisfied, but if there are 16 under there, he would have to veto all 16 of them in order to get the one project he didn't like.

Senator **Mattingly**. Yes, hopefully; as long as he has got me head of the Military Construction Subcommittee, he won't have too much of a problem. The problems we got—problems with the other committees also.

Senator **Ford**. I understand. But the point I was making is that you do agree with the Senator from Oregon, then, as it relates to the military construction dash army, that he would have to veto that section which would include all the projects, whether it was 1 or 15.

Senator **Mattingly**. And send it back, right. I would just like to make one comment. Senator Hatfield had made a comment in reference to the power, about the constitutional powers—and Senator Vandenberg had made an excellent statement one time. He said the line-item veto does not give the President one single additional affirmative power. He cannot start anything as a result, he can only stop something long enough to focus the attention of the country on it and long enough to force two-thirds of the House and the Senate to agree to it in spite of him and his reasons. If they should persist in their adverse judgment, he went on to say, its only harm, if any, would be in the temporary delay while Congress, the country, stopped, looked and listened. He went on to say I have never known any lives to be lost by obedience to this familiar injunction.

And I think therein lies a great justification for at least reporting this bill out and getting it to the floor of the Senate and let the Senate decide.

The **Chairman**. The distinguished Senator from Washington is waiting, but let me just ask you two very brief questions before we let you go.

You quoted a very elegant statement from Senator Vandenberg, whose memory is held in great respect by all of us. But that statement was made prior to 1974, which was the year in which the provisions for rescission were enacted.

Now, could you tell us concisely why you think the procedures that are outlined in Senate bill 43 are superior to the rescission process?

Senator MATTINGLY. You are talking about the 1974 Budget Control Act?

The CHAIRMAN. I am talking about the rescission process.

Senator MATTINGLY. I think your staff is doing a study with respect to that, and I think that will pull up some of the information that is required in that area.

The Chairman. We will look at the staff study and see what exactly the record on rescissions is, and maybe we should expand that to a study of the rescission process itself.

Senator MATTINGLY. But that still doesn't say that we still shouldn't use other tools.

The CHAIRMAN. But it might be useful if you would reflect on that and give us your further views as to why the procedures under Senate bill 43 would, in your opinion, be better than a rescission process, and we will hold the record open and give you an opportunity to do that.

Senator MATTINGLY. I would like to clarify something that I said to the Senator from Kentucky in reference to the enrolling clerks, to clarify it. That the role of the clerk—I noted that it would be the House enrolling clerk who would perform the preparation functions, because appropriation bills will continue to originate in the House. His role will continue to be limited—and that's what I quoted from the bill.

And I know there has been some—you didn't make any comment in reference to it, Senator Ford, but I thought I ought to clarify that section that was in there.

The CHAIRMAN. The final question that I have—in Mr. Killian's opinion, he comments that it, meaning the Congress, can avoid the intended operation of S. 43 by ensuring that the President may not pick and choose among the items with which it is most concerned.

Now, I presume by that that he means that if the Congress wants to frustrate the ability of the President to apply a line-item veto, that it can in some way cluster items, or that it could suspend the operation of this law.

Senator MATTINGLY. I think Senator Baker had mentioned that, I believe, in his statement about the frustration—I mean what the Congress could do; they could make everything just one item, they could force that to happen. I don't see that happening on a trial-period basis; I think the magnifying glass would be on the Congress and on the President on a trial basis. I think if the Congress tried to circumvent by making everything one item that it would be to the detriment of the Congress, and I think that the President of the United States on a trial period, if he misused it, then it would go the way of the dinosaur, the line-item veto.

The CHAIRMAN. You would disagree with Mr. Killian on that point.

Senator MATTINGLY. Yes, I do.

The CHAIRMAN. Thank you very much.

Senator MATTINGLY. Thank you, Senator.

The CHAIRMAN. Senator Evans.

## TESTIMONY OF HON. DANIEL J. EVANS, A U.S. SENATOR FROM THE STATE OF WASHINGTON.

Senator EVANS. Thank you, Mr. Chairman. I will try to be brief, because I know that many of the arguments and the discussion which has been held correlates with my testimony, and I would ask that my full statement be made part of the record.

The CHAIRMAN. Without objection, your full statement will be part of the record.

Senator EVANS. Mr. Chairman, Senator Ford, I wish to express my thanks to the committee for this opportunity to appear on behalf of the line-item veto, and to commend my colleague from Georgia for the remarkable doggedness—if I remember, the bulldog is the mascot of the University of Georgia—and certainly he has shown that tendency in following a very important piece of legislation.

Last week this committee reported a resolution to establish a Temporary Select Committee To Study The Congressional Budget Process.

To a major extent, I think, this action was in response to a growing dissatisfaction with how we deal with this Nation's budget. And I think we ought to look at the line-item veto in the same light, just one budgetary tool, maybe not a large one, maybe unimportant—who knows?—that might assist us in crafting a lean and responsible Federal budget. It's a low-risk proposition with a 2-year expiration clause.

Let me react to some of the major arguments raised by those opposed to the line-item veto—and many of these were arguments raised eloquently by the senior Senator from Oregon.

Granting the President too much authority and creating an imbalance of the constitutional checks and balances.

Frankly, I am a fundamentalist when it comes to the Constitution. I dislike adding many of the proposals that have been suggested for the Constitution, including, for instance, a balanced-budget amendment to the Constitution. I think Senator Ford has pointed out quite adequately that nothing prevents a President currently from submitting a balanced budget; nothing prevents the Congress from adopting a balanced budget.

But let me go back into the not-so-recent past to examine what has happened to Presidential veto authority, because it seems to me that that is what is really at stake. Have we unbalanced in recent years the traditional and original intent of our constitutional forebearers in establishing the checks and balances between the three branches of Government.

In the Federalist Papers, both James Madison and Alexander Hamilton argued against an absolute veto and for a qualified veto on the ground that a qualified veto would be used more frequently. And let me emphasize that: A qualified veto would be used more frequently.

Hamilton stated the general opinion that the absolute veto is a power odious in appearance and useless in practice. Hamilton concluded that there would be greater danger of the President not using his power when necessary than of his using it too often or too much.

In recent years I am afraid Congress has developed practices that often convert the qualified veto into something closely akin to the absolute veto, a device too rigorous to be used as a security against bad laws.

Congress has adopted the practice of adding riders to bills and, in particular, legislative riders in pork-barrel appropriations to vital bills that cannot stand on their own merit. This practice has impaired and diminished that qualified veto significantly. Current legislative practice presents the President with the choice of take all of what is offered or nothing. Such proposals have no other purpose than to intimidate the President, emasculate the veto power, and to foreclose the opportunity for reconsideration.

The veto was designed not only to provide the benefits of reconsideration but also those of anticipation, the foresight that brings self-control. As Hamilton pointed out, it is not just an actual veto but the anticipation of a veto that will provide check and balance. Congress has invented techniques that give it less reason to anticipate a veto, thus less reason to be restrained and responsible.

Congress simply has turned the tables on the President, making the veto work for legislative license instead of against it.

The qualified veto is a part of the internal balance of the Constitution. It is a counterforce that offsets potential abuse of power by the legislature. Since the founding, Congress has encroached on this veto power.

The proposal that we are discussing today will address this concern—not that we are granting the President greater authority, but simply returning balance to the relationship between the President and Congress, much as it was in the early days of our Republic.

The question as to whether it affects only a small portion of the budget or not, as Senator Hatfield has suggested—they say that the President wouldn't exercise his veto authority on defense items. We don't know that; it depends on the defense item, and, of course, it depends on a President. I would suggest that this is a trial period. If the trial period works, we would very likely extend it to future Presidents who may well have an interest in defense spending and some of its elements, just as this President may have an interest in nondefense expenditure. To say that all that is left is 15 percent of governmental spending is simply inaccurate when applied to the potential use by future Presidents if in fact this bill were to be extended.

Mr. Chairman, a more appropriate question to look at is not the portion of the budget subject to a line-item veto but how the President gets access to any spending item. Perhaps the best place to look is the fiscal 1985 continuing resolution. This resolution contained almost $400 billion of spending, 8 of the 13 appropriations acts, authorized and some unauthorized water projects; it delayed us to the extent that 500,000 governmental workers were furloughed.

This year will we further intimidate the President by putting all 13 appropriations acts into a single continuing resolution? Will we add to it, as we attempted to last year—Superfund, Grove City, busing, tuition tax credits, gun control, comparable worth, and whatever else we might think valuable? Then wrap it into one package and present it to the President, saying take it or leave it, or maybe, even more appropriately, find it, it's in there somewhere.

And, of course, doing that at the very end of the fiscal year, or perhaps even after a new fiscal year has started, with no time for reflection, little time for negotiation—I suggest that while some may ridicule the line-item veto authority as being insignificant, even these small reductions amount to something that cannot be concluded to be insignificant.

I suggest that we ought not to view the potential use of the item veto as meaning that the President would then have the need for only one-third of the Congress to support him. Certainly new proposals can be initiated by the Congress and passed by majority vote, modifying to some degree the particular item that the President had vetoed, and may well have Presidential approval.

I shall not even discuss the new powers that may be associated with the enrolling clerks. I believe those are adequately handled in my statement and in the statement of Senator Mattingly.

The question of constitutionality of this particular proposal I think is also established well through the precedents under Gephardt Rule.

And, finally, Mr. Chairman, as a three-time Governor of the State of Washington, I valued the line-item veto more than any other budget tool. I don't believe our legislature felt that they were unduly intimidated by the Governor. Benefits were not only derived from the ability to remove waste from the budget, but also served as a check for germaneness.

And I must say that I have been astonished in my short period of experience here in the Senate with the lack of germaneness of elements that appear both in appropriations and nonappropriations acts.

I can guarantee you one thing: There was a very careful watch for germaneness of legislation under each title of each bill that went through the Washington State Legislature, so that if it were not germane it almost always was vetoed from that legislation.

As a result I was seldom presented a bill that was not clear and consistent within the framework of the title under which it passed.

Now, sure there is a difference between legislatures and Congress, between a President and a Governor. But what I find most disturbing is the fact that we here in this present-day Congress lay on the President's desk these huge—some would call trainloads of pork. My definition, I guess, of "pork," Senator Ford, is those special projects for other States. But they are attached to vital pieces of legislation, and it is impossible for a President to deal with them independently. When he signs such legislation, he accepts a whole series of expenditures many of which could not stand on their own merits.

A recent Gallup poll suggests that 67 percent of those asked thought the President should have line-item veto authority. I think it's time we join these citizens and seek the benefits of the line-item veto proposal in terms of budget control, germaneness, reconsideration, anticipation, and a rebalancing between the executive and legislative branches.

And I suggest the best way to do that is to test the value of the line-item veto for a 2-year period. If we like it, then it ought to be done in a way that is not just for the President, not just for the present, not just for this administration, not just for this Congress—not as a miracle cure to our continuing deficit concern, but as an important maybe small first step toward fiscal responsibility.

Thank you, Mr. Chairman.

[The prepared statement of Senator Evans follows:]

### Prepared Statement of Senator Daniel J. Evans, a U.S. Senator from the State of Washington

Mr. Chairman, ranking minority member and other distinguished members of the Committee on Rules and Administration, I wish to express my thanks to the committee for holding this hearing and providing me with the opportunity to express my views on this important issue of line-item veto.

Last week, this committee reported a resolution to establish a temporary select committee to study the congressional budget process. To a major extent, this action was in response to a growing dissatisfaction with how we deal with this Nation's budget.

The line-item veto should be considered in the same light—one budgetary tool that can assist us in crafting a lean, responsibile Federal budget.

This line-item veto proposal can be characterized as a low-risk/high reward proposition. As a low-risk proposition, the legislation includes a 2-year expiration clause. If it does not work it will die on its own. If we try it and it does work, the potential reward is great by allowing a President the privilege and the opportunity of using this one tool, in conjunction with others, to bring our budget deficits under control. If it has the effect even as a small spending control tool, then I suspect Congress might well continue such a proposal, perhaps on a 2-year basis, so Congress would always retain control to continue it or let it die.

Even with such a low-risk/high-reward proposition, there continues to be opposition. Perhaps it would be of greatest benefit to review and discuss the major arguments raised by those opposed to the line-item veto.

1. *Granting the President too much authority and creating an imbalance of the constitutional checks and balances.*—Some suggest that by granting the President line-item veto authority, the balance between Executive and legislative power over the allocation of Federal resources will be upset. Let us look, however, at recent practice.

Since the beginning of the Truman administration, 14,081 public bills have passed, with only 355 vetoed—a veto rate of 2.5 percent. 10.1 percent of these vetoes were overriden. Twenty-three appropriation bills were vetoed during this ssme period, bu the rate of success for the Congress in overriding appropriations vetoes is 30.4 percent—triple that of the normal rate for all public bills. I suggest this can be interpreted to indicate that Congress has maintained and perhaps increased its influence over the ultimate passage of appropriation bills, while restraining the Presidential use of veto authority.

Mr. Chairman, allow me to digress into the not so recent past to examine what has happened to Presidential veto authority. In the Federalist Papers, both James Madison and Alexander Hamilton argued against an absolute veto and for a qualified veto on the grounds that a qualified veto will be used more frequently. Let me emphasize that. A qualified veto will be used more frequently. Hamilton stated the general opinion that the absolute veto is, "A power odious in appearance, useless in practice." Hamilton concluded that, "There would be greater danger of the President not using his power when necessary, than of his using it too often or too much."

In recent years, Congress has developed practices that often convert the qualified veto into something closely akin to the absolute veto, a device too rigorous to be used as a security against bad laws. Congress has adopted the practice of adding riders to bills and in particular legislative riders and pork-barrel appropriations to vital bills that cannot stand on their own merit. This practice has impaired and diminished that qualified veto significantly. Current legislative practice presents the President with the choice of take all of what is offered or nothing. Such proposals have no other purpose than to intimidate the President, to emasculate the veto power, to foreclose the opportunity for reconsideration.

The veto was designed not only to provide the benefits of reconsideration but also those of anticipation—the foresight that brings self-control. As Hamilton pointed out, it is not just an actual veto but the anticipation of a veto that will provide check and balance. Congress has invented techniques that give it less reason to anticipate a veto, thus less reason to be restrained and responsible.

Current legislative practice subverts the veto power provided in the Constitution by providing Congress with an alternative to self-discipline. The alternative is a form of blackmail, extortion of the Executive's approval through threat, and a process to add trainloads of unworthy projects that could not stand on their own merit. Congress has turned the tables on the President making the veto work for legislature license instead of against it.

The qualified veto is a part of the internal balance of the Constitution. It is a counterforce that offsets potential abuse of power by the Legislature. Since the founding, Congress has encroached on this veto power. This proposal that we are discussing today will address this concern—not that we're granting the President with greater authority, but returning balance to the relationship between the President and Congress.

2. *Affecting only a small portion of the Federal budget.*—Some suggest that only a small portion of the Federal budget will be subject to the provisions of this proposal. They say that the President wouldn't exercise his veto authority on defense items. Entitlement and interest spending and revenue measures could not be reached. All that is left is about 15 percent of Government spending categorized under nondefense discretionary spending.

Admittedly, to curb Government spending we must look at mandatory spending—control and reform. But as to the remainder of the budget, nothing should or can be sacred. I personally would suggest that at some future point in time we should look seriously at including tax expenditures and authorization measures. For the present, however, we should start with appropriations and stop second-guessing the President as to where he, or future presidents may use this authority—we must provide the opportunity.

Mr. Chairman, a more appropriate question to look as is not the portion of the budget subject to a line-item veto, but how does the President find access to these spending items.

Perhaps one of the finest examples of recent years has been the fiscal 1985 continuing resolution. This resolution contained almost $400 billion of spending and 8 of 13 appropriations acts. It delayed us to the extent that 500,000 Government workers were furloughed. This year, will we further intimidate a President by putting all 13 appropriations bills into a single continuing resolution? Will we add to it, as we attempted to last year—Superfund, Grove City, busing, tutition tax credits, gun control, comparable worth, and whatever else we might think valuable? Then wrap it into one package and present it to the President, saying "take it or leave it," or may-be even more appropriately "find it, it's in there."

I suggest that while some may ridicule the line item veto authority as being insignificant, even these small reductions amount to something that cannot be concluded to be insignificant.

3. *Investing new powers in the enrolling clerks.*—This line-item veto proposal directs the Senate enrolling clerks to divide appropriations bills into items which stand as separate bills. A few suggest that this is granting these clerks new powers at the expense of Members of Congress. Nothing is more ludicrous.

The Clerk of the House and the Secretary of the Senate currently share the responsibility to review bills and ensure accuracy with what was passed by Congress; direction is then provided to the enrolling clerks.

Members of Congress retain the authority to determine the structure of a bill; an "item" will be determined by the structure of appropriations bills considered and passed by Congress.

The United States Code gives direction as to a numbered section; "each section (of a bill) shall be numbered, and shall contain, as nearly as may be, a single proposition."

These three points ensure that no increased authority and discretion will be delegated to the enrolling clerks.

4. *Questioning its constitutionality.*—The question of consitutionality appears to be resolved through the use of the precedents established by the Gephardt rule. Also with the review and endorsement of the President and the Office of Management and Budget and with a growing number of supportive members in this body, we can

leave behind the question of constitutionality and get on with discussions that examine the merits of a line-item veto.

Mr. Chairman, as a three-term Governor of the State of Washington, I valued the line-item veto more than any other budget tool. Benefits were not only derived from the ability to remove waste from the budget, but also served as a check for germaneness. I seldom was presented a bill that was not clear and consistent within the framework of the title under which it passed. Admittedly, there is a difference between this Congress and State legislatures and between a President and a Governor. But what I find most disturbing is the fact that we, here in this present-day Congress, lay on the President's desk huge trainloads of pork attached to vital pieces of legislation. We make it almost impossible for the President to veto what is absolutely necessary to carry on the operations of Government. When he signs such legislation, he also must accept a whole series of expenditures which could not stand on their own merits.

A recent Gallup poll suggests that 67 percent of those asked thought the President should have line-item veto authority. It is time we join these citizens and seek the benefits of this line-item veto proposal—benefits in the areas of (1) budget control, (2) germaneness, (3) reconsideration, (4) anticipation and (5) balance between the executive and legislative branches.

It is time for us to test the value of the line-item veto—not just for the present, not just for this administration, not just for this Congress, not as a miracle cure to our continuing deficit concern—but as an important first toward fiscal responsibility.

The CHAIRMAN. Thank you very much, Senator Evans. I would agree with you that you play a very strong card when you cite the lamentable example of the fiscal year 1985 continuing resolution—an inexcusable act of Congress, in my judgment, not only because of the $400 billion that it appropriated, but because it attempted to revise the entire Criminal Code of the United States with 800 pages of legal language that Members of Congress should have mastered, understood, comprehended, which they obviously did not. The kind of charade that was played with that continuing resolution goes beyond any discipline, however, that Senate bill 43 is likely to apply.

I had an uncle who used to say that "Against stupidity we wage war in vain." I am afraid that is the case with these continuing resolutions.

If the Congress will allow its own procedures to be so prostituted, which we did in that case, I think it's going to take more than Senate bill 43 to resolve the difficulty.

But, having said that, let me ask you the same question I asked the Senator from Georgia. If the goal is to give the President an opportunity to criticize and suspend a particular item, what do you find wrong with the rescission process that we now have? Why is this different?

Senator EVANS. Well, it's my understanding that the rescission process is really aimed at a time of fiscal emergency, and for the President to react to problems as they arise.

But, at any rate, it is something which comes after the proposal has passed Congress. Frankly, I think that we should hit some of these policy issues up front.

The CHAIRMAN. Well, it's the same timeframe.

Senator EVANS. The best way to do that, I think, is giving the President the opportunity to approve or veto as individually as reasonable separate items in the appropriations bills. And I think that is a more straightforward way to do it than the rescission process.

The CHAIRMAN. The rescission process operates on the same time frame. The only difference, as we commented earlier, is the rescission process is determined by a majority vote. If there were a veto under the Constitution, it would require a two-thirds vote.

Senator EVANS. Well, that's correct, and I think that that is an important distinction. As I pointed out in my testimony, if the President vetoes any portion or any line item in an appropriations act or any bill, for that matter, there are two ways for the Congress to react. You can react by attempting to override the veto, or you can react by passing somewhat revised legislation which then may have Presidential approval.

And I think that the rescission authority to the President modifies to a fair degree the original constitutional balance between the Chief Executive and the Congress wherein the opportunity for veto requires, then, a two-thirds vote for overriding, or having precisely the same subject area, and frankly I think that is the reasonable balance. We have had it for 200 years.

The opportunity, then, after a veto, is for Congress to try to pass some modified legislation rather than just by majority vote thwarting the President's rescission.

The CHAIRMAN. You said that, as Governor of the State of Washington, you valued the line-item veto more than any other budget tool.

Is the State of Washington a balanced-budget State?

Senator EVANS. Indeed, it is. Sometimes it's tough to keep a balanced budget during the course of a biennium when economic changes and economic slowdowns cause a shrinkage in revenues, and then you have to go through sometimes very painful cutbacks.

But during the 12 years I was Governor, we were always a balanced-budget State—and we have been since.

The CHAIRMAN. Since you operated under a balanced budget, this would have to be hypothetical question, but how would you choose, with a line-item veto, which items you were going to veto when you are faced with a $200-billion deficit? Would you choose on ideological grounds? Would you choose on the basis of what you felt the size of the Federal Government should be, the scope of the responsibilities of the Federal Government? Would you choose on the merit of projects? How would you choose?

Senator EVANS. Well, I think I would choose in exactly the same way I chose as Governor. I don't think it makes any essential difference whether you have a balanced-budget requirement or whether you are running at a significant deficit. The decision to veto is one on the basis of your determination as to the value or worth of a particular project or series of projects.

Certainly I suppose, just as the composite ideology of the Congress is involved in passing legislation, so, too, is the ideology of the President in responding to it. Just as the determination of Congress or a legislature is involved in determining the worth of particular projects, so, too, does the Governor or President attempt to respond in his or her view of the value of those projects.

So I don't think it makes any essential difference whether you are operating under a balanced budget or not. In fact, there is probably more reason for an item veto at the Federal level where we do have the added problem of trying to bring budgets under control, where at least at the State level a budget as submitted to the Governor already is in balance.

The CHAIRMAN. Just one final question. You said that you have no doubt about the constitutionality of Senate bill 43.

Senator EVANS. Well, I say that as a nonlawyer, and I fully recognize that the ultimate decision on constitutionality is one that is across the street in the Supreme Court.

The CHAIRMAN. Well, lawyer or not, Members of Congress are frequently called upon to make determinations of constitutionality; in fact, that is our ultimate duty, because we are sworn to uphold and defend the Constitution, which requires us to make some determination of what is constitutional.

Senator EVANS. I believe that under the proposal submitted here, the concept of submitting to the President as an enrolled bill separate items leaves him with the constitutional authority, as clearly as I can read it, to accept or reject an item or an individual proposal presented to him.

The CHAIRMAN. Mr. Killian concluded that this would be constitutional, notwithstanding the opinion of the Court in the *Chadha* case, which placed great emphasis on following precisely the constitutional process, that is, passage by each House of the Congress, plus the approval of the President.

Now, what is contemplated under this bill is a variant on that process, and Mr. Killian, who is an eminent constitutional authority, may be right about it.

I am just wondering, however, in the light of a case like *Vallejo* v. *Buckley,* where the Court held unconstitutional certain provisions of the election laws which it felt violated the First Amendment, notwithstanding the fact that the Congress has express authority to regulate elections.

So I am not sure that the constitutionality question is as clear as it has been expressed.

Senator EVANS. Well, I guess none of us can be absolutely certain; we cannot be absolutely certain of any bill we pass in terms of its constitutionality until, I suppose, the Supreme Court has ultimately ruled on constitutionality.

The CHAIRMAN. Well, it seems to me we ought to be morally certain or else we oughtn't to support it.

Senator EVANS. That's correct.

The CHAIRMAN. As our oath requires us to be.

Senator EVANS. And I believe in each of the elements set forth in this bill, that it is done in a constitutional fashion; otherwise I certainly wouldn't be a cosponsor of the legislation. When you say that each House of the Congress must approve, some might suggest that, well, if it's after it's passed, it's separated into individual items, and if some would then suggest that the Congress might not have approved each one of those items independently—now, that sounds to me like a very good argument for an item veto, that you have hidden something in that bill that Congress wouldn't pass.

The CHAIRMAN. No; but what about the case of a bill that originates in the Senate and is amended in the House, so that the Senate has not acted independently on the House amendment?

Senator EVANS. Well, I don't know of any bill that can go to the President until it's had the differences between the House and the Senate ameliorated, so that there is a single bill in final form.

The **Chairman**. I think we are very consciously making legislative history here. It is your opinion that the conference process and the adoption of the conference report would satisfy that constitutional provision that each House has acted?

Senator **Evans**. I would think so; that's at least the common practice here in Congress.

The **Chairman**. Senator Ford.

Senator **Ford**. Beyond the constitutional question, I've got a little problem—if it ain't right, the more you do to correct it makes it worse.

But you made a statement here that since Truman's Administration there have been over 14,000 pieces of legislation with only 355 reported vetoes, a veto rate of 2.5 percent—and that 10 percent of those vetoes were overridden.

Our record is not very good—that's twenty-five one-hundredths of a the bills that have been overridden, if I read that right.

And then only six bills since that time as it relates to appropriations have been overridden. That may be seven if your percentage is precise, and apparently that's where you got 10.1 percent and 30.4 percent, so I'll just take it in round figures.

So our record hasn't been all that great with overriding vetoes of the President.

Senator **Evans**. Well, I would say that 30 percent in appropriations bills is a pretty good record.

Senator **Ford**. Well, that's just six bills, or seven, out of the total.

Senator **Evans**. We've only had 23 shots at it.

Senator **Ford**. Nevertheless, there are very few bills that are overridden, based on your statement in here. So that indicates to me, as an observer, that the President wins most of them—the President wins most of the vetoes.

Senator **Evans**. No; I really don't think so. Remember, the President cannot initiate anything; all he is doing is limiting—and I suspect——

Senator **Ford**. Oh, I understand, but I'm just reading your paragraph here that there were 355 bills vetoed.

Senator **Evans**. Yes; I understand. I guess I would say that the one thing that doesn't appear in here—and we have not had a chance to go back—in fact, it might be impossible to go back and try to review the other bills not overridden to see to what degree alternative pieces of legislation were passed which did some, most, or virtually all of which Congress had originally suggested.

Senator **Ford**. Now, we are getting down to a point that the White House is always involved in every piece of legislation, daily.

Senator **Evans**. Of course they are.

Senator **Ford**. So, then, they are trying to prevent anything going to the White House that the President doesn't like and getting everything going to the White House that the President does like.

Now, I don't know where your legislature was located, but it was on the first floor in our capitol building.

Senator **Evans**. It was in ours, too.

Senator **Ford**. OK, I prevented everything I could that I didn't like from coming to the first floor.

Senator **Evans**. Mine only had to come to the second.

Senator FORD. But the same procedure.

Senator EVANS. Sure.

Senator FORD. So I had every morning, I'm sure as you did, while the legislature was in session—the leadership session, we analyzed every piece of legislation by number, every department analyzed what it would do, what it would not do, if it would raise taxes or whatever—every piece of legislation. And we put a stamp of approval or disapproval on it.

Now, what I am getting to is that not only do they have that kind of authority—and you understand that one-fiftieth, as I do.

Senator EVANS. Yes.

Senator FORD. But I think our procedure probably was better because it was closer to the legislators than we find here—the President has only talked to me twice in 5 years, and I feel fortunate that he has talked to me twice, and both times he was behind and looking for help, you know.

The CHAIRMAN. That's when they usually call.

Senator FORD. He hasn't needed much help. But if the White House has this daily contact and the bills that the President receives are not necessarily ones that he would dislike—we are branching a little bit further—he wouldn't have to have the input that he has now, he would just veto it. And he would sit back there—and I think the give and take in the work every day with you and me gives both sides a better opportunity to discuss the pros and cons of any item, rather than just sit back and if I don't like it I'm going to veto it.

So you are going to be searching out to see if it's going to be vetoed.

I think that's a disservice to us.

Senator EVANS. Well, I might say, though, that even though we did that on a regular basis—and I have no doubt that the President would continue to do that on a daily basis with the Congress—it didn't prevent the legislature from passing bills that I thought ought to be subject to veto. In the first place, I never once in 12 years had a legislature in which both houses were controlled by the Republican Party, which probably was fortunate or I would have vetoed more bills.

But we had this split legislature. There were often differences in policy, and they would pass bills just because that's what they thought ought to happen, and even in spite of the warnings wanted to find out what the Governor would do, and perhaps even make the record in terms of veto.

Senator FORD. How many bills during your 12 years as Governor were overridden?

Senator EVANS. Well, none were overridden for the first 10½ years; they finally got to me in the 11th year. But that doesn't mean that many pieces of legislation which were vetoed didn't come back in somewhat modified forms and were——

Senator FORD. Well, you won your point, didn't you, when they came back in modified forms?

Senator EVANS. No, not always. I might have won a portion of the point, or a bill that was entirely odious became only slightly smelly and, you know, it's a matter of negotiation; you can't just willy-nilly run over the legislature without having them override a veto. So it becomes a matter of negotiation, as our Constitution calls for. I think most of us fail to recognize that a Governor or a President is part of a legislative process. To the degree that you have a veto authority or the responsibility for signing legislation, you are part of the legislative process, and I think an appropriate part.

Senator FORD. I still get back to the point—and you made a very good statement—that we wouldn't be worried about line-item veto if we had a balanced budget.

Senator EVANS. And if we had a strong germaneness rule.

Senator FORD. And no legislation on an appropriations bill—we do that all the time. And the 2-year budget, which we are going to work on, may give us relief, to give us an opportunity to look at the bills and the appropriations bills much longer and be able to do a better job.

I don't think that there is a lack of talent in the Congress or ability; I think there is a lack of time in order to do the thorough job that is necessary. And that creates some of the problems.

Now, Senator Hatfield was very concerned about our legislative process, and how S. 43 would apply. In many cases, you reference, and when you reference and you then have the clerks enroll, you would sever the reference, and therefore that reference would fall on its own. That bothered him considerably, because that is something that we have agreed on, that we expect it to happen, and under this legislation, it would not.

So we are going to have to change some of our procedures, we are going to have to change some of our rules, and only on a temporary basis.

The massive problem will be changing the rules probably.

Senator EVANS. Well, it does seem to me that there may need to be some modification or some rule changes with the end result of better clarification and simplification and stating of the case in the complete item so that the President has all of that in front of him. I think that may make good sense anyhow.

Senator FORD. Well, let me get to another point. Senator Mattingly agreed—and maybe I didn't ask the question clearly in the beginning—but he agreed before he left here with Senator Hatfield, and we used his subcommittee, Military Construction—did you hear that?

Senator EVANS. Yes.

Senator FORD. That military construction dash army. Now, he would have to veto the whole section in order to get to one project he did not like—"he" being the President. Where if he wants to rescind an item, he can do that today. I think that he has broader authority and broader power with the exception—that it takes two-thirds to override, where it only takes a majority under the rescission process—but you do delay, and that delay is what I understood you meant in referring to what Madison and others said, delay so we could take a better look at it.

And if he rescinds, we still have an opportunity under the present procedure to get to the item much better than under this particular legislation. And that seems to me that the President would not line-item veto under the circumstances; he would rescind that one item and let the rest of them go, and the line-item veto would not be appropriate as it related to the President's ability to select.

And at 15 percent of the budget—that's all we are looking—as Senator Hatfield said, you can eliminate the whole thing and still have over a $100 billion deficit in 1986.

Senator EVANS. Well, of course, the example you were using was outside the 15 percent of the budget that Senator Hatfield claims would only be the focus, and I am not at all——

Senator FORD. That would be the 2 years of the trial basis of this. And I think he was making an immediate judgment, and that is what we have to do, where it's temporary.

Senator EVANS. Well, I think we try it, and if it proves to be useful and workable, I suggest we probably would extend it. And I would suggest that for at least some period of time it be extended on a 2-year continuing basis until we were certain of its usefulness for a longer period.

Again, I think that the difference between rescission and line-item veto—and I think both are useful under certain circumstances—is just the question of policy making. By saying to a President that we are going to send a great big huge bill that you simply cannot veto because the whole government would stop—and then you can use your rescission authority. It seems to me that what we are doing in that respect is distorting the Constitution. We have said that the President should have the opportunity to approve or disapprove legislation, and, if disapproved, it should be subject to a two-thirds override or a modification. We may make it almost impossible for the President to veto. Who knows, next year we may decide to put all 13 appropriations acts in a continuing resolution.

Senator FORD. What's new about that? We haven't had but one completed budget since the budget process has been put into place.

Senator EVANS. I know, but we are getting closer and closer to a total kind of continuing resolution, in spite of very good efforts and good work by the Appropriations Committee, which has reported each of the budgets out in suitable time. But again it's the policy. We are keeping from the President the opportunity to effectively utilize his veto authority.

Now, if he were to take military construction and one or two items within there he felt were improper or inappropriate, certainly he might have to veto that item, including 13 or 14 others. And then he invites the Congress—or the Congress on its own volition might well come back with a different number and might leave some things out or might modify some things, that becomes part of the regular determination between the President and the Congress. I think that's appropriate. You wouldn't lose all 16; you would certainly have most of them coming back very quickly in an alternative piece of legislation.

Senator FORD. Well, Senator, how much sense does it make to give an individual veto power who has submitted a request for more money than the Congress has authorized or appropriated?

Senator EVANS. I hold no brief for this President in terms of the budgets he has submitted or not submitted. This is not aimed at any President—but the fact that, of course, it's for a 2-year trial period will affect only this President.

But it's certainly my hope that if given a trial and proven to be successful, as I believe it would be, then it would apply to all Presidents. Perhaps the next President may submit a balanced budget to the Congress—no one knows.

Senator **Ford**. How quickly do you think you can get rid of this after we once get it on the books?

Senator **Evans**. Pardon?

Senator **Ford**. How fast do you think we could eliminate this particular item once it's on the books?

Senator **Evans**. Well, if it has a continuing 2-year end or sunset, it wouldn't take very long.

Senator **Ford**. Are you going to have a 2-year sunset?

Senator **Evans**. Well, I certainly would suggest that until such time as we were very sure that it was useful to do on a permanent basis. I certainly would not at this point suggest that we ought to implement something like this without any sunsetting at all.

Senator **Ford**. Mr. Chairman, I think what is the issue here is whether Congress is going to do its job. That I think is the real issue, to make the total and tough decisions to reduce the deficit. We are getting close to abdicating, under this particular resolution, our constitutionally mandated responsibilities.

[Beeping signals.]

And the White House sees us all here all the time—do you hear those beep-beep-beeps? You know, they got the message, they are listening in.

And asking the President to do our work for us.

I am very concerned—as I was opposed to the legislative veto. It was found to be unconstitutional in the *Chadha* case. And we have had the authority to change any of those things any time we wanted to. We just said to this creature we created: You are a bad creature, so we want legislative veto—and we pounded that among our constituents for 10 to 12 years. And all we were doing was finding a whipping boy that we created ourselves—created before I got here. But nevertheless we still have the authority. I think we abdicated our responsibilities under the legislative veto—I was never for it. And hopefully it will never again rear its ugly head.

But I suspect it will be out there again to show we want to stop all these regulations. We have the ability to do it now, if we want to.

So we have the ability to do these other things, and we are just trying to find some way that will be the fad for awhile. Deregulation was the word around this town. Now that people are finding they are losing their air flights coming into their community, that rates have tripled since deregulation—I'm getting letters from the Chamber of Commerce: Turn it around, get us back to where we were—even though they were strong advocates of deregulation in the beginning.

Thank you, Mr. Chairman.

Senator **Evans**. Well, I certainly do not disagree at all that we ought to be taking on our responsibility. My prime concern with this piece of legislation is that we may well have in the way we operate over the last generation or so seriously shifted the original concept of the constitutional balance between the President and the Congress. We have done so by making it less and less possible for the President to use the qualified veto—and that's this attempt, to return to the qualified veto.

Senator FORD. Well, Senator, any President who has a wet pen and one-third of the votes can do anything he wants to.

Senator EVANS. But it becomes less and less possible for a President to do that when the consequences of a veto are so astronomical, when the whole budget and a lot of riders are attached to it.

Senator FORD. Well, you'd say to shut down the Government—well, it cost us more to shut down that 1 day and there wasn't any need for anybody to do that—it cost us more for that 1 day than we attempted to save. That was showmanship.

Senator EVANS. Sure.

Senator FORD. You agree with that—thank you. But we have all the opportunities to do whatever we want to do, and we just need to be about the people's business in a manner that they can feel good about.

The division in the Senate the other night indicated, where Republicans voted with Democrats and Democrats voted with Republicans—and we came out 49-49. And if the two that are in the hospital had been there, it would have been 50-50. We exercised the Constitution that night.

Why do we want to alter the Constitution now? You know, I just don't understand why we want to give away the authority we already have. What we are doing is admitting we can't do it, and we are trying to give that responsibility to somebody else.

It may be a constitutionally correct position, but we are still abdicating—and "abdication" is not a word in my vocabulary.

Senator EVANS. I certainly would agree—I don't believe we are abdicating; I think that over the years we have assumed more power than the original Constitution called for—and it's a rebalancing I think very closely back to the original concepts of Hamilton and Adams and others who helped write the Constitution.

Senator FORD. Well, if you go back to their position, though, you wouldn't want a two-thirds vote aeguirement; you would want a majority vote where presidents just veto lots of items and make you rethink them again, and have to go through another vote process. I don't think you would want to return to the two-thirds vote under their philosophy, as I read it, and I have tried to read it more than one time.

Senator EVANS. I think the final adoption of the Constitution was on a two-thirds basis for a reason. It was on the concept, and as carefully as I can read it, the belief at that time that the President would be presented essentially bills that were much more likely to be simple and straightforward and subject to single approval or disapproval than today's enormously complex pieces of single legislation.

The CHAIRMAN. Thank you, gentlemen. As I listened to the colloquy that you have conducted in the last few minutes, what occurs to me is that what is lacking here is not a new law—we have got plenty of those—or a new power on the part of the President—he's got a lot of power now—but it is the ability to achieve what I think the Constitution really envisioned, which is the coordinate exercise of the power of Government, through the President and the Congress, to coordinate their activities more perfectly.

And if we were to do that, I think we would get along better in reducing the deficit as well as in a great many other aspects of Government.

Thank you very much.

Senator Evans. Thank you, Mr. Chairman.

The Chairman. We now have a panel—Dr. Louis Fisher of the Congressional Research Service; Dr. Allen Schick of the American Enterprise Institute; and Dr. Norman Ornstein of the American Enterprise Institute.

Gentlemen, we apologize for having held you so long. The intramural debate went on longer than we anticipated.

In order to be fair to you and to be fair to us and give us some chance to probe your views, do you think you could each summarize in about 5 minutes, and then we will have some time left over for questions?

Who would like to be first?

## TESTIMONY OF LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE; ALLEN SCHICK, AMERICAN ENTERPRISE INSTITUTE; AND NORMAN ORNSTEIN, AMERICAN ENTERPRISE INSTITUTE.

Dr. Fisher. Shall we go alphabetically? I am Louis Fisher.

My statement makes four points.

The Chairman. Shall we agree, if Senator Ford will agree, that we will put all the full statements in the record as if read, and then you can summarize.

Senator Ford I agree, Mr. Chairman.

Dr. Fisher. Mr. Chairman, my statement focuses on, first, the question of scope of S. 43; second, the question of savings that could come from item veto authority; third, the question of separation of powers discussed here this morning, particularly related to the notion of a national budget, and the prerogative of Congress to determine priorities; and, lastly, I raise a question about the constitutionality of S. 43.

The scope of S. 43, at least in the press has created some confusion. There was an editorial in the Wall Street Journal that thought with S. 43 President Reagan could have vetoed the farm relief portion of the bill sent to him containing African aid. Of course, the bill sent to him was not an appropriations bill, which is the scope of the Mattingly bill.

Also I thought it was interesting that in March of this year OMB Director Stockman, in testimony not related at all to the Mattingly bill, thought that the President with item veto authority could have last year vetoed the authority given to the Comptroller General on bid-protest questions. That was in the Deficit Reduction Act—it is not an appropriations bill. But the Stockman testimony is interesting because it shows that, although we talk about item-veto authority, in fact looking at the States what is desired by the administration is not just the authority to veto items; the administration wants the authority which 10 Governors have to reduce items, item-reduction authority. And, very important, the administration wants authority not just to veto appropriations matters but substantive legislation, particularly substantive riders placed in appropriations bills.

Those are the three objectives. And I thought on that objective, which has been discussed here this morning, the large continuing resolution that you passed last October 12, Public Law 98-473.

The CHAIRMAN. Was I too harsh in my description of it?

Dr. FISHER. Not at all. It's interesting how the Mattingly bill would operate. You have—included in the continuing resolution—you have really five whole appropriations bills placed in it. I think we know a little bit about the unnumbered paragraphs and the numbered sections of appropriations bills.

But, as you say, Mr. Chairman, it also includes the whole Crime Act here, and the last part includes a Food Assistance Act, a great deal of substantive legislation—and since S. 43 does include continuing resolutions, how would it operate here? Would the enrolling clerk be able to go into the crime bill and somehow break that apart? And if the enrolling clerk did that and if the President exercised item veto over the Crime Act, would that make it in a sense unworkable or something that Congress never intended?

It's one question to use item veto against an appropriations item; it's another to use it in substantive legislation where you may disrupt whatever design that Congress intended.

Also with regard to appropriations and legislation, this past year I read about 150 decisions at the State level on item veto, and one of the most complex issues is the ability of the Governor to veto a condition on appropriations, to cut off a condition, cut off a proviso, or cut off a qualification and keep the appropriation. It's a very difficult matter. And under S. 43, on the unnumbered paragraph, the President would have to take it or leave it, the appropriation amount plus whatever condition is there.

However, the President could veto the numbered sections where you have conditions at the back of an appropriations bill.

We don't know how this would work. Perhaps Congress, in anticipating a President, might take many of the conditions in the back which apply to the whole bill and pull them up and insert them in each unnumbered paragraph to make sure that the appropriations are governed by the condition or the qualification.

The savings that could amount from this is unclear. You are certainly setting up a whole new system of dynamics and incentives at the legislative level and at the Executive level. You may get savings of certain programs that the President didn't ask for; on the other hand, through White House lobbying or departmental lobbying, you might get certain leverage over legislators that was not there before.

The CHAIRMAN. I take it that you are associated with the legislative branch of government. [Laughter.]

Dr. FISHER. I am a staff member for Congressional Research Service.

Dr. ORNSTEIN. Thoroughly independent, Mr. Chairman.

The CHAIRMAN. As he should be.

Dr. FISHER. The item veto certainly would give the White House an opportunity to call a Member where an item of interest is in that person's State or district and say that is being considered for item veto at the Executive level and ask at the same time how that Member decides to vote next week on some other bill that the administration wants, and it would be a leverage which doesn't exist today but would exist under that.

How that would net out, the total result—it could actually lead to certain increases that wouldn't be available under the current system.

My main point would be that you are introducing a new element in the dynamics between the branches. Whether it leads to less spending or more spending, no one can say right now.

I will skip over the third point I had on the national budget. I did point out in my statement: In 1921 there was serious debate about restricting Members of Congress so that they could not add to the President's budget, or they could add to the President's budget only if they got a two-thirds majority, or if they got the permission from a departmental head. That was all rejected, and Congress retained after 1921 in the Budget and Accounting Act full authority to reduce or increase, and therefore shape, the final budget.

Under S. 43 I think the President, by vetoing items he had not asked for and did not want, would be able to shape the national budget much more in the way that he presented it.

My final point is on the constitutionality of S. 43. I am not sure on this point. As I read the bill, it looks as though the enrolling clerk would take out an unnumbered paragraph or numbered section and then, based on the cross-reference to the U.S. Code here, would add to it an enacting or resolving clause at the top, and then the appropriate language for an appropriations bill. And then the question is whether that satisfies article I under the Constitution. Did that bill, the way it has now been rearranged by the enrolling clerk, actually pass the House and the Senate?

I think it's very uncertain in my mind—and, Mr. Chairman, you are correct: In 1983 the Supreme Court underscored the regular process, that you will have a bill pass the House and the Senate and be presented to the President.

[The prepared statement of Dr. Fisher follows:]

## PREPARED STATEMENT OF LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS

Chairman Mathias and Members of the Committee, thank you for the opportunity to appear today to discuss the question of authorizing an item veto for the President. My remarks are directed primarily at the statutory route proposed by Senator Mattingly in S. 43, although his proposal raises a number of general issues about the effects and side-effects of granting item-veto power.

S. 43 would permit the enrolling clerk to separate each "item" from an appropriations bill and enroll each item as a separate bill or joint resolution to be submitted to the President for his signature or veto. Items are defined as any numbered section or unnumbered paragraph. The bill restricts the use of item-veto authority to any general or special appropriation bill or any bill or joint resolution making supplemental, deficiency, or continuing appropriations.

It is important to understand the reach of S. 43, because there appears to be some uncertainty about the scope of item-veto authority. An editorial in the Wall Street Journal on March 8, 1985, suggested that the Mattingly bill would have made it unnecessary for President Reagan to veto the entire Farm Credit and African Famine Relief Bill (H.R. 1096). The editorial believed that the President, armed with the Mattingly bill, could have item vetoed the farm credit provision while leaving intact African aid. But H.R. 1096 was not an appropriations bill. To reach such matters, the Mattingly bill would have to cover loan programs and other indirect forms of financial assistance, including entitlement programs usually found in authorization or tax bills.

I also noticed that OMB Director David Stockman, in his testimony before the House Government Operations Committee on March 7, 1985, pointed out that the availability of item-veto authority would have allowed President Reagan to delete GAO's bid-protest powers added to the Deficit Reduction Act. Under the Mattingly bill, however, the bid-protest provision would not have been subject to an item veto because the Deficit Reduction Act was not an appropriations bill.

Unlike the Wall Street Journal, Director Stockman did not base his remark on the procedure available in the Mattingly bill. Instead, he reflected the administration's interest in securing item-veto authority in its broadest terms. First the authority to veto items. Second, the authority to reduce items. (Although 43 governors have item-veto power, only ten are given item-reduction authority.) Third, the administration wants authority to delete not merely appropriation items but substantive law as well, such as the GAO provision. These three objectives—item veto, item-reduction authority, and the power to veto substantive provisions—are advocated in a report by the Cabinet Council on Economic Affairs, January 19, 1984.

I began by discussing the scope of item-veto authority because this has been a recurrent and troublesome issue at the state level. Some governors vetoed items in the judiciary's budget. Others invoked the item veto against the legislature. At times the item veto has been used against revolving funds or special funding techniques. But the most vexing issue is the question of attaching conditions, provisos, and qualifications to an appropriation. May the Executive strike conditions, provisos, and qualifications while retaining the appropriation?

This dispute may not present a major problem under the Mattingly bill, depending upon the direction given to the enrolling clerks by the Secretary of the Senate and the Clerk of the House of Representatives. Presumably an unnumbered paragraph of an appropriation bill would include both the appropriation and the condition. The President could not keep the former and sever the latter. However, the President could retain an unnumbered paragraph and strike a numbered section that contains a condition, proviso, or qualification that applies to all appropriations in the bill.

I dwell on this point because state courts have tried to maintain a balance between two competing values: the right of the governor to veto items, and the right of the legislature to condition an appropriation. State judges have had an extremely difficult time in devising a formula or test that can discriminate between proper and improper deletions of conditions. To protect its prerogatives, Congress might decide to rewrite appropriations bills by placing important conditions in each unnumbered paragraph rather than leaving them at the end in numbered sections.

A major difference between state governments and the Federal Government is the degree of specificity in state appropriations bills and the lump-sum nature of congressional appropriations bills. Specificity in state bills complement the governor's item-veto authority. The governor is able to delete individual projects and programs. At the federal level, however, "items" rarely appear in appropriations bills. They are placed in committee reports or supporting agency documents. Most governors are able to reach "pork" and "logrolling" projects. Under the Mattingly bill, however, the President would be limited to a single lump sum of, say $951 million for the General Construction account of the Corps of Engineers. The individual projects contemplated by that aggregate amount are placed in nonstatutory sources.

To pattern itself after the states, the Federal Government would have to do more than simply adopt the item veto. It would have to restructure appropriations bills by resorting to line-itemization. That approach, as you know, has been resisted not merely by Congress but by the executive branch. Agency officials want the latitude and flexibility associated with lunp-sum funding.

A different question concerns the amount of money that might by saved by the Mattingly bill. Although most projects and programs would be outside the President's reach, some programs would be vulnerable. President Reagan, for example, could delete funding for such unnumbered paragraphs as the Legal Services Corporation, Amtrak, the Small Business Administration, and other programs that the administration would like to terminate. The aggregate total for these cuts could be substantial, assuming that Congress did not combine in a single unnumbered paragraph a threatened program with one that the President favored. State legislatures have learned how to do that.

I should point out that the Mattingly bill presents an either/or choice. Agencies or programs funded by a single unnumbered paragraph either would be terminated or, in the event of a congressional override, allowed to continue. There would be no opportunity for a choice in-between, unless the administration were given item-reduction authority. It is possible that the *threat* of an item veto might lead to middle-ground negotiations. Members of Congress might agree to cut back on a program in return for the President's promise not to invoke his item-veto authority.

This either/or confrontation could be avoided by adding greater detail to an appropriations bill. Instead of providing a lump-sum amount, many of the details from committee reports and agency documents could be incorporated in the public law. This would allow the President to trim programs rather than abolish them.

It is unclear what line-itemization would do for fiscal responsibility. In addition to making programs more inflexible for agency managers, it might lead to legislative irresponsibility. The political dynamics are difficult to predict. It is possible that "savings" achieved by the item veto might merely neutralize spending that was added because the President possessed item-veto authority. The net effects would be hard to determine. A study in Pennsylvania concluded: "When a legislator, even though opposed in principle to an appropriation, is reasonably certain that the governor will slice it down to more moderate size, he is tempted to bolster himself politically by voting large sums of money to a popular cause." [1] Another writer said that the experience of Michigan supported the comment of one author who claimed that the item veto "has encouraged legislators to please their constituents by voting for appropriations far in excess of anticipated revenues thus forcing the governor to make the inevitable reductions and incur the wrath of the interests adversely affected." [2] During hearings last year, Senator Hatfield noted: "We also know that the legislatures in States which have the line-item veto routinely 'pad' their budgets, and that was my experience, with projects which they expect, or even want their Governors to veto. It is a wonderful way for a Democrat-controlled legislature, which I had, to put a Republican Governor on the spot: Let him be the one to line-item these issues that were either politically popular, or very emotional." [3]

The availability of the item veto would give the White House an additional tool to influence members of Congress. Whether this tactic would restrain or encourage spending is difficult to say. One can imagine scenarios in either direction. The threat of an item veto could force legislators to scale back the size of a program. On the other hand, White House lobbyists could advise a member of Congress that certain projects in their district or state are being considered for an item veto. The member could then be asked how he or she plans to vote on the administration's bill scheduled for the following week. Perhaps a minor project would survive in return for the legislator's willingness to support a costly administration program.

This is all speculative, of course, but it is fairly certain that the availability of the item veto would introduce a powerful dynamic to executive-legislative relations. Because of the informal and private communications between the branches, it would be difficult to maintain much accountability for fiscal results. Members would vote with new incentives, subjected to pressures and calculations that did not exist before.

What effect would the Mattingly bill have on the separation of powers? It is true that the bill contains a sunset clause limiting the item-veto authority to a two-year test period. Moreover, the form of appropriations bills and their subdivision by enrolling clerks remain within the exclusive control of Congress. Yet the shift of item-veto authority to the President would augment presidential power, at least in the short run. By how much we cannot say, but the balance will change.

Also altered will be the concept of a national budget. When Congress passed the Budget and Accounting Act of 1921, it placed upon the President the responsibility for submitting a budget. At the same time, it retained complete freedom to alter the President's budget, whether through increases or decreases. The final size and shape of the budget, then, was a legislative prerogative that Congress consciously and deliberately reserved to itself, subject to the President's general veto power. Congress rejected proposals that would have prohibited it from increasing the President's budget unless it had the approval of a department head or could secure a two-thirds majority.

The Mattingly bill changes the policy adopted by Congress in 1921. The President can be expected to exercise his item veto against congressional add-ons and congressional priorities that he opposes. The final size and shape of the budget will resemble to a much greater degree what the President submitted. As with the general veto, Congress will find it difficult to muster a two-thirds vote in each House to override a President's item veto.

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[1] M. Nelson McGeary, "The Governor's Veto in Pennsylvania," 41 Am. Pol. Sci. Rev. 941, 943 (1947).

[2] John A. Perkins, "The Role of the Governor of Michigan in the Enactment of Appropriations," Michigan Governmental Studies No. 11 (1943), at 56, quoting Austin F. Macdonald, American State Government and Administration 209–10 (1940).

[3] "Line-Item Veto," hearing before the Senate Committee on the Judiciary, 98th Cong., 2d Sess. 21 (1984).

The Economic Report issued in February 1985 is quite candid in explaining the use to be made of the item veto. As noted on page 96 of the report, adoption of the line-item veto "may not have substantial effect on total Federal expenditure. . . . less than one-half of the Federal budget would be subject to a line-item veto, and most of that would be for defense." But the item veto is available not merely to restrain spending but "to change the composition of Federal expenditures—from activities preferred by the Congress to activities preferred by the President."

What is at stake, then, is not simply the prospect of fiscal savings but a significant shift in the balance of power between Congress and the President. Whether we do this by constitutional amendment or by short-term grants of statutory power, the implications for our constitutional system must be carefully considered.

Finally, a question might be raised about the constitutionality of the procedures adopted in S. 43. It states that the "item" to be enrolled as a bill or joint resolution "shall confrom in style and form to the applicable provisions of chapter 2 of title 1, United States Code . . . ." It shall also "bear the designation of the measure of which it was an item prior to such enrollment, together with such other designation as may be necessary to distinguish such bill or joint resolution from other bills or joint resolutions enrolled pursuant to paragraph (1) with respect to the same measure."

In other words, the enrolling clerk would take a numbered section or unnumbered paragraph and add to it an enacting or resolving clause, provide the appropriate title, and presumably affix a new Senate or House bill number (1 U.S.C. 101-105). This procedure must satisfy the constitutional procedure established in Article I, Section 7: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States. . . ." Such a bill, in the form as fashioned by the enrolling clerk and submitted to the President, would not appear to have passed the House of Representatives and the Senate.

Dr. SCHICK. Thank you, Mr. Chairman. The Senate has had a rule for a number of years: No TV. Some people think that it is permitted now to have an IV, but the IV that they refer to is not an item veto but the IV that was wheeled in with the junior Senator from California some days ago in the crucial vote on the budget package. So this body has not yet taken a position on the item veto.

Let me make a few points, with your permission, Mr. Chairman. S. 43, if it were the law, would much more likely affect substantive provisions in appropriation bills not dealing with money, but dealing with policy, than the amount of funds spent by the Government of the United States. More particularly they would affect the "general provisions," which are numbered paragraphs in the regular appropriations bills. These general provisions set conditions, limitations, and sometimes enact new legislation. Under S. 43, they could be plucked out by the President and vetoed.

Of course, there is the possibility, as Mr. Fisher suggested, that Congress would respond by rearranging appropriations so as to fold these general provisions into the accounts themselves rather than separating them.

But note these are general provisions, they apply to the entire appropriations bill—that's why they are general—and not to any individual account.

It might be questioned as to what would happen if the enrolling clerk were to create as a separate bill a general provision which really was tied to accounts which now are in different measures, to be signed or vetoed by the President.

Even if S. 43 were to pass constitutional muster, I do not believe that it passes logical or policy-making or good legislative procedure muster.

I wouldn't speak to the constitutionality of it—that's practicing law without a license—but I do not believe that the procedure in S. 43 would satisfy the orderly legislative process that is required.

With respect to budgetary effects, we can engage in a good deal of conjecture. But let me explain one possibility for you, Mr. Chairman, by picking out one State, which happens to be yours. I pick it out for a different reason: Maryland is the only State in which the Governor is armed with something more powerful than an item veto, more powerful in fact than that which is possessed by the governor of any other State. The Maryland Legislature is barred by the State consitution from inserting or raising an item which has not been requested by the Governor; it cannot, with respect to any item, appropriate more than the Governor has requested.

Just a few months ago, in the last days of the Maryland legislative session, the appropriations committee decided that it would recommend an across-the-board cutback in spending to lower overall State spending. The Governor responded, according to the press reports, by threatening to withhold a supplemental appropriations bill which is usually the State's version of a "Christmas tree," bill introduced in the last days of the session. The bill is introduced by the Governor in response to or evasion of the constitutional bar against legislative initiative on spending bills. This supplemental bill contains what the legislature wants.

In effect, the Governor said to the legislature: You give me my money and I will give you yours. The example shows the result can be that total spending, despite constitutional control, even more potent than an item veto, can exceed either what the legislature or the executive would want.

I am not saying this would happen in all circumstances. In some years, I believe, an item veto would lead to higher spending. In most years, in my estimation, it would lead to modestly but not significantly lower expenditures.

My last point goes not so much to good legislation, but good budgeting. As an observer of the U.S. Senate, I was not subject to the ardors of putting together the budget package, which took months to negotiate and finally to pass several days ago. But the concept of packaging which has been used in negotiations between the two Houses and with the White House for half a dozen years is a way of focusing attention, not on particular items, but on the total level of spending, on the total deficit, and on the difficult steps that might be taken to ameliorate the deficit and to achieve a more acceptable level of expenditure.

It is the nature of packaging that Members and the President alike must sacrifice their preferences with respect to individual items so that the package can be put together. When you look at a package, you look at a total. When you look at S. 43, you are looking at items.

And it seems to me that the itemization process, the taking-apart process, in S. 43 might indeed impede the difficult but essential contemporary task of putting together responsible budgetary packages.

Thank you, Mr. Chairman.

[The prepared statement of Dr. Schick follows:]

## Prepared Statement of Allen Schick, American Interprise Institute

Mr. Chairman, I appreciate this opportunity to discuss S. 43 which would provide a means by which the President could exercise an item veto of appropriations. The fact that this bill is co-sponsored by almost half of the Members of the Senate attests to the great importance attached by this body to control of federal expenditures. The need for effective budget control has not been lessened by Senate passage last week of a budget package that would trim more than $50 billion from the fiscal 1986 deficit and more than $200 billion over the next three years. Even if this painfully-balanced package were fully enacted into law, the federal government would still face deficits in excess of $100 billion a year, as far ahead as the eye can see. Moreover, these deficits would ensue if the economy continues to grow without pause; if the economy were to undergo a periodic downturn, much higher deficits would result.

Congress needs effective, genuine spending control; it does not suffice to make political or technical changes that would alter the balance of budgetary power but not make much of a dent in federal spending. Because control is so urgently needed, permit me, Mr. Chairman, to subject S. 43 to tough cross examination. My analysis will proceed on three levels. First, I will examine S. 43 from a technical point of view. This is important because the bill relies on an ingenious and rarely-used method to overcome the constitutional impediment to the item veto. Second, I will analyze the budgetary potential of S. 43. Finally, I will consider this measure in the light of political relations between the legislative and executive branches.

### THE S. 43 APPROACH

The key to S. 43 is the requirement that each "item" (defined as "any numbered section and any unnumbered paragraph") of an appropriation bill is to be enrolled as a separate bill for presentation to the President. Constitutional eyebrows might be raised by a procedure that permits laws to be assembled from the fissionable material of legislative action. Concern might also be voiced at the opportunity for mischief opened by a procedure which empowers enrolling clerks to decide what is deemed to have passed the House and Senate. I would note, however, that a similar procedure has been applied for some years by the House in stripping the public debt provision from budget resolutions and packaging them as separate bills deemed to have been passed in regular order.

Because constitutional change is so far reaching but constitutional trial and error so costly, I welcome the limited experiment authorized by S. 43. If the procedure proves to be workable and desirable, it can be elevatd to constitutional status. If it spawns unforeseen problems or fails to have the intended budgetary effects, the item veto experiment can be permitted to lapse without occasioning the difficulties that would result from efforts to repeal a constitutional amendment.

The key operative elements of S. 43's item veto are numbered sections and unnumbered paragraphs. Most of the numbered sections are the "general provisions" attached to appropriation bills. Over the past decade, there has been a steady increase in the number of these provisions. The increase has been due in part to the failure of Congress to enact reauthorizing legislation (with the result that legislative provisions have been added to appropriation bills). But a more prominent factor has been the effort of Congress to limit the use of appropriated funds by executive agencies. Most the general provisions do not deal with the level of spending, but with the conditions under which federal dollars are to be spent. (Continuing appropriations are the major exception; the numbered sections in them often set spending levels.) It is ironic that these general provisions rather than spending levels might turn out to be the principal targets of the item veto.

With respect to the unnumbered paragraphs, there is nothing in S. 43 to prevent Congress from enlarging the scope of paragraphs so as to encompass more than one account. If this were to happen, the President might be bereft of items to veto.

### THE BUDGETARY IMPACT OF AN ITEM VETO

In assuring the budgetary impact of S. 43, it is useful to distinguish between the potential impact of the item veto if current budget practices and arrangements were unchanged, and its effect if these practices were altered.

Current practices offer meager support for the proposition that the item veto would enable the President to pluck high spending items from appropriation bills. The lumping together of appropriation items into a single paragraph or account has been going on for more than half a century (often at the initiative of the executive branch which welcomes the flexibility provided by broader appropriations). As a result, the bulk of federal spending is now concentrated in a small number of accounts. Although the federal budget is divided into more than 1100 accounts, data prepared by the Senate Computer Center reveal that the 50 largest accounts add up to more than 80 percent of total outlays. These huge accounts are of two types: permanent appropriations (such as for social security and interest on the public debt) which become available without any action by Congress, and omnibus appropriations (such as for health and education programs) which combine numerous activities in a single account.

The permanent appropriations, as well as other expenditures outside the annual appropriations process, would be beyond the reach of the item veto. Significantly, therefore, many of the programs which have had the highest growth rates in recent years would not be controlled by the S. 43 mechanism. Moreover, as Norman Ornstein and others have noted, defense appropriations would be the main category of expenditure covered by the item veto. According to some computations, if defense and mandatory spending were removed, the item veto would apply to the less than 10 percent of outlays allocated to discretionary domestic programs.

An examination of nondefense discretionary programs shows that the big, controversial dollars are in omnibus accounts, each of which is comprised of multiple activities. Omnibus accounts are like appropriation bills: just as the President often is impelled to sign a sprawling appropriation bill into law even though he opposes some of its provisions, so, too, a President armed with an S. 43 veto might fight it expedient to sign an entire account into law even if he disapproved of the spending levels set for some of the items in it.

The logic of the item veto is that the more discrete an appropriation, the more vulnerable it is to presidential veto. But itemized appropriations offer little opportunity to cutting federal expenditures. If the smallest 1000 accounts (out of the 1150 mentioned above) were terminated by presidential veto, the spending reduction would be less than that targetted by the Senate in the deficit reduction package recently approved by it. The plain fact is that the item veto is ill-suited to control spending in an era of lump-sum appropriations.

The incapacity of the item veto might be increased if S. 43 were to spur Congress to alter its budget practices so as to deliberately shelter favored items from presidential attack. S. 43 would give Congress a strong incentive to package items favored by the President with matters that he opposes, in much the same manner as it now inserts funds not wanted by the President into "veto proof" continuing or supplemental appropriations. Moreover, Congress could protect controversial items in appropriation reports, beyond the reach of the President's veto power. While the legal status of report language mandating particular activities or expenditures is questionable, the skill with which Congress uses reports to get its way is not. Agencies generally abide by the dictates of appropriation reports. The Defense Department does not close production lines for weapons systems singled out for continued funding in appropriation reports.

In assessing the prospective budgetary impact of the item veto, it is necessary to conjecture how the President and Congress would behave if they had disparate spending positions. The usual interpretation—upon which S. 43 appears to be predicated—is that the President would item veto congressional add-ons and that, therefore, overall spending would be below the level sought by Congress. This hypothesis assumes that Congress always wants to spend more and the President always wants to spend less. Suppose, however, that the roles were reversed, and it was the White House that sought additional funds. Lest this be seen as a far-fetched possibility, it is exactly the situation that has recently prevailed with respect to the procurement of MX missiles, the financing of Contra activity in Nicaragua, and overall defense spending. When the President wants to spend more, the item veto will not lead to less spending; indeed, it might lead to more: Here's why:

In a typical year, the President and Congress disagree more over the mix of expenditures than over the total amount. In recent years, for example, the President has favored more defense spending while Congress has sought more for social programs. This conflict over priorities invites a situation in which each branch satisfies its spending preferences by conceding the items wanted by the other branch. The President gets more guns and Congress gets more butter, with the result that total spending is higher than the level preferred by either branch.

This scenario was recently played out in a budgetary dispute between the Governor of Maryland and the State Legislature. The conflict has a particular relevance for S. 43 because the Maryland Constitution gives the government an advance item veto. The Legislature is barred from increasing any item in the Governor's budget; under the Constitution, its only options are to provide the funds requested by the Governor or to appropriate a lesser amount. No other state is a restrictive of legislative appropriations power. But things don't quite work out in the fashion intended by the Maryland Constitution. In exchange for getting the funds he requested, the Governor files a supplemental bill containing (among other matters) items favored by the Legislature. As a case in point, several months ago, in its zeal to cut spending, the Legislature came up with the idea of an across-the-board percentage reduction in appropriation. The Governor reportedly threatened to withhold the supplemental appropriation unless his agencies were provided with full funding.

There is no end to conjectural analysis of the potential effect of an S. 43 item veto on government spending. A balanced view is that in most years total spending might be slightly—but not significantly—lower, and that in some years it would be a bit higher.

### THE POLITICAL IMPACT OF AN ITEM VETO

If the item veto would not make much of a dent in federal spending, why has it been so avidly sought by President Reagan and many of his predecessors? The straightforward answer is that the item veto has the potential of strenthening the position of the President vis a vis Congress. For one thing, when Congress and the President disagree as to spending priorities, the President would have a better chance of imposing his preferences. The President could either wield the item veto to remove spending added by Congress or he could threaten to exercise the veto unless Congress provided the funds he wanted.

In the present circumstance, where deficits are very high and difficult to eradicate, the campaign for an item veto is one means of pointing the blame for high spending at congressional profligacy. The President can argue that if only he had the item veto, things would be much better. Of course, if he had an item veto, the President would have to more realistically face the budgetary consequences of his policies.

In my view, the item veto is a political obstacle to effective budget control. Concentrating on discrete items might have been appropriate a century ago when spending was modest and most funds were allocated for the continuing operations of government. In the present situation, however, budget control depends on reaching agreement as to total spending and on a package of program and expenditure policies consistent with that total. The recent Senate package was passed only because many Members were willing to subordinate their preferences with respect to individual items to an overall budget policy.

S. 43 is defective because it can't see the budgetary forest for the trees.

Dr. ORNSTEIN. Thank you, Mr. Chairman. I'll just make a couple of general points to build on what my colleagues have suggested.

I think this piece of legislation and/or the constitutional amendment that would almost certainly follow would represent an enormous shift of power from the Congress to the President. I think that's bad generally. I don't see how anyone can call himself a fundamentalist on the Constitution and believe that shifting more power to the President is, in fact, in keeping with the spirit of the Constitution or the intentions of the Founding Fathers.

I also think it represents a wrong premise specifically when it comes to this issue. The underlying suggestion is that Presidents are more penurious than Congress, that the Congress is out there spending and spending and that Presidents are trying to hold the floodgates against that spending.

I think any reasonable survey of American history or examination of the motives of Presidents and Congress would suggest that that simply is not true. Presidents almost always have their own agendas, their own programs that they want to push, and, as Senator Hatfield's chart would suggest, that is true of this President as well. We have differences in priorities; we don't have differences in overall motives in general.

I don't think that this is going to result in lowered spending over a period of time or deal with the problem.

I also think that attempts such as this and attempts such as the constitutional amendment to balance the budget are diversionary in nature and wrong in intent. They assume that our problem is a structural one. I do not believe that history or the contemporary era would suggest that we have an institutional problem in the relationship between President and Congress or in the way that Congress is structured, the way the power is divided, that is responsible for deficits and for the growth in Government spending.

The conventional wisdom is that, people in Congress are so concerned with reelection that they simply spend more money and put more into pork-barrel projects and specific areas where they can get electoral credit. But this is not true.

In reality, the share of the budget that has gone to discretionary domestic spending, those areas that would fit the definitions of "pork" that everybody in this room have put out today, has gone down dramatically in the last several years, and in large part by very conscious decisions made by Congress. And it will continue to go down, whether we deal with these deficits in a more dramatic fashion or not, and will soon be probably below 10 percent of the budget.

And, finally, let me underscore a point that Allen Schick made that builds on what I have suggested. Presidents, this one, past ones, future ones, want to make their mark on the country; they all have elements that they want to bring to bear on the policy process, a lot of which cause spending to go up. Presidents are going to use whatever powers are at their discretion to get their way. This particular element, this particular power, which has only modest direct potential to reduce spending, would be used by Presidents as leverage to achieve their goals.

And I think, just to take an example, I could easily imagine President Reagan, in his strong desire to get all the MX missiles that he wanted, coming to the chairman of this committee and saying: If you want to save the Chesapeake Bay, you will vote for the MX missiles.

If he had that power under his authority, the chances are that we would end up with more MX missiles, saving the Chesapeake Bay, a lot of dams and bridges and other things, and that the net result would be more spending to satisfy the priorities of the President and Congress together in much the way as Allen Schick has suggested it was used in the Maryland Legislature.

Thank you.

[The following article, by Dr. Ornstein, was received for inclusion in the record:]

## The Politics of the Deficit*

(By Norman J. Ornstein)

### SUMMARY

Federal deficits have been an issue of the politics of American elections at least since the first party platform on record, in 1840; deficits have been a preoccupation of the politics of governing at least since the days of the Founding Fathers. The Founding Fathers set up a structure of Government to prevent a powerful central government from exercising undue control, first and foremost, over the power of the purse. To restrain government power over spending and taxing, they deliberately and explicity gave more control to the Congress of the United States than to the president, expecting that the direct representatives of the people, in a system of checks and balances, would be more restrained.

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* Portions of this essay appeared originally in a presentation for the Fourth Annual Donald S. MacNaughton Symposium, "What Should Be Done about the Federal Deficit?" (May 15-17, 1984), and in "Veto the Line-Item Veto," Fortune (Jan. 7, 1985).

In this paper, a historical review of deficits and the responses of government to them suggests that the Founding Fathers' assumptions were, and remain, fundamentally accurate. Through nearly 200 years, Congress has not acted in a basically irresponsible fashion, spending more money than it took in to satisfy short-term and parochial political needs. To the contrary, through the broad sweep of American history, Congress has struggled to restrain the growth of federal spending and to limit deficits and the public debt, through direct action and through periodic adjustments of its own structures to minimize the deleterious effects of political pressures. Indeed, the great growth in federal debt and the periodic problems with deficits are much more the result of massive expenditures to support major wars and the activist policies of presidents striving to make their mark on American society and in American history.

An examination of the problems of the 1960s through the 1980s confirms this judgment. Proposals, like the line-item veto, that would give more power to the president and weaken the hand of Congress to restrain the growth of federal spending and deal with the deficit are, upon analysis, misguided and might well have the opposite effect. The conclusion of this paper is that the best way to deal with contemporary deficits is by having two strong and confident political institutions, not be weakening the powers of the Congress. Some relatively minor institutional changes might well help, but there is no institutional or structural panacea. Finally, the paper argues, the solution begins not with the institutions but with the public. Meaningful action on the deficit requires public pressure for urgent action and public agreement to waive deep-seated individual policy preferences for a greater goal. Action by elites to encourage that set of responses will help in turn to encourage the appropriate institutional responses to the immediate deficit problems.

When Walter F. Mondale made the federal deficit the centerpiece of his presidential campaign in his acceptance speech at the 1984 Democratic convention in San Francisco, it was perhaps the first time that a major party presidential candidate had based his campaign on this issue. But of course it was by no means the first time that deficits and their corollaries, government spending and taxation, had been a part of American political debate. The question of government deficits was raised in the first party platform on record, that of the Democratic party in 1840; the fifth of nine planks in that platform read: "Resolved, that it is the duty of every branch of government, to enforce and practive the most rigid economy, in conducting our public affairs, and that no more revenue ought to be raised, than is required to defray the necessary expenses of the government." [1]

In virtually every campaing since then, both parties have gone on record against deficits, for restraint in government spending, and for limited taxation. But in very few campaigns has the consequence of too much spending or too little taxation—that is, large government deficits—been a major issue. Some parties, notably the Republicans in the 1930s and 1940s, tried to make deficits the major issue but failed to penetrate the public consciousness. Evidence from the November 6 election suggests that Mondale also failed to do so. Although deficits have been important but not decisive in the politics of elections, they have been much more of a preocuupation in the politics of governing.

## A HISTORICAL REVIEW OF DEFICITS AND GOVERNMENT IN THE UNITED STATES

When the Founding Fathers deliberated over the American form of government, they were concerned with the accumulation of power and its irresponsible use by individuals and institutions of government. Nothing concerned them more than the power to tax indiscriminately—a root cause, of course, of the American Revolution—and the power of government to spend money to advance its own causes. For these reasons the Founding Fathers divided the power of the purse, as they did all other government powers, creating a series of checks and balances. But they very deliberately and very carefully gave the fundmental power of the purse to the institution of government most directly connected to the public at large: Congress. And they gave a greater share of this power, the power to initiate revenue measures, to the House of Representatives. No appropriation from the public treasury could be accomplished without the approval of both houses of Congress and the signature of the president; no revenue could be raised unless the action was initiated by the House of Representatives, approved by both houses of Congress, and signed by the president. Although the president could veto any money measure, as he could veto any piece of legislation passed by Congress, Congress was made the ultimate arbiter; presidential vetoes could be overrridden by two-thirds voteos in both houses, with no legal recourse by the president.

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[1] Donald Bruce Johnson and Paul H. Porter, "National Party Platforms," 5th ed. (Champaign: University of Illinois Press, 1975), p. 2.

The founders believed that the greatest forces of restraint on governmental power over spending and taxing were in the public at large, through their representatives. They had trepidations, or course; they recognized the political interests of individual representatives and the power of factions but believed that checks and balances would provide some solution for these problems.

During the early years of American government, the founders' schema worked largely as they had intended. Saddled with a large revolutionary war debt of about $80 million, the political actors in the federal government struggled to keep the debt from getting worse and to reduce it. They had remarkable success, cutting the debt nearly in half by 1811. But then came a problem that was to be recurrent: war.

The War of 1812 brought four years (1812–1815) of big deficits. By its end the federal debt had tripled. Redoubled efforts by government in the next quarter-century and more reduced the debt once again—almost, in the 1830s, to zero. It rose again during the war with Mexico in 1847 to 1849 but was reduced steadily once more in its aftermath.

Then came a war that brought, by any standard, enormous economic costs: the Civil War. Whereas the four years of the War of 1812 produced a total deficit of $68.5 mil~~lion, the~~ four years of the Civil War increased the debt of the national government by nearly $2.6 billion, as federal spending soared (to $1.3 billion in 1865) without, of course, a corresponding rise in federal receipts.

The Civil War created a crisis in the federal government and an unprecedented debt, which first went over $1 billion in 1863 and over $2 billion two years later and came dangerously close to $3 billion. The government responded to this crisis with both institutional reform and fiscal restraint. Immediately after the Civil War, the House of Representatives created a unified Appropriations Committee; the Senate followed two years later. These committees took over some of the responsibility that had been handled by the House Ways and Means and the Senate Finance committees, which had managed both appropriations and revenue measures. But the Civil War had placed enormous burdens on these two committees. The war required, for example, dramatic changes in tax laws, including three major tariff bills and the first federal tax on incomes, as well as major acts authorizing new government bonds and the first national banking system. This put too much work in the hands of a single committee; the response of Congress was to create new committees to handle the burdens of appropriations and spending more reasonably.

That process worked remarkably well in the years following the Civil War, when the federal government ran an almost incredible string of surpluses. As Thomas Wander has noted, "In the 31 years between 1867 and 1897 there were 27 years of budget surpluses at the federal level. In 13 of those years, revenues exceeded expenditures by more than 25 percent; only one year saw expenditures exceed revenues by as much as 10 percent." [2]

The restraint on spending that this record of prudence demonstrated was driven by the two penurious Appropriations committees, aided, at least in the House of Representatives, by a change in House rules in 1876. This change, the so-called Holman rule, allowed general legislation in appropriations bills if the result was to reduce expenditures. The result was reduced expenditures but also a tremendous expansion of the legislative power of the Appropriations Committee. With years of big surpluses, the political interests of individual members of Congress began to come to the fore, and resentment over both the tremendous power wielded by the Appropriations Committee and its pruning-knife attitude led in the 1870s and 1880s to a near revolt in the House. That revolt ultimately crippled the appropriations process and the Appropriations Committee, sending spending bills to a number of other committees more interested in logrolling than in spending restraint.

These other committees, from Agriculture to Commerce to Post Offices and Post Roads, participated actively in expanding the role of the federal government during the 1880s and 1890s. But the changes did not bring federal deficits--not until the Spanish-American War, coupled with the recession of 1896, created another cycle of large federal deficits.

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[2] Thomas Wander, "Patterns of Change in the Congressional Budget Process, 1865–1975," Congress and the Presidency, vol. 9, no. 2 (Autumn 1982), p. 48.

Through the 1890s and in the early twentieth century, when the federal government had become a major force in American society with expanded responsibilities and activity, federal decision makers grappled with a new set of problems, and the federal budget results demonstrated this change. Wars, recessions, and other economic problems and the less disciplined approach by Congress to federal spending brought more erratic budget behavior. In the twenty years from 1896 to 1916, the federal government experienced eleven years of deficit to only nine of surplus; the net effect, however, was a national debt in 1916 almost the same as it had been twenty years earlier.

But 1917 brought a new and more severe crisis, World War I. This war, like the Civil War, brought staggering deficits greater than all others in the history of the country combined. In 1916, after 127 years, the total public debt stood at $1.23 billion; by 1919 it had increased twentyfold, to $25.5 billion. The deficit in 1919 alone was over $13 billion. Congress and the executive branch, suddenly faced with a national debt much greater than they could comprehend, once again turned to institutional reform in search of solutions. On June 1, 1920, the House restored exclusive spending power to its Appropriations Committee and enlarged the committee from twenty-one to thirty-five members. On March 5, 1922, the Senate also concentrated spending powers in its Appropriations Committee (although it left the membership at sixteen). And in the largest single reform up to that time, the Budget and Accounting Act of 1921, Congress reformed the executive branch, unifying the federal budget under the president's control and creating the Bureau of the Budget and the General Accounting Office (GAO). The bureau was created as an arm of the executive branch for fiscal management; the GAO was intended to be an arm of Congress, strengthening the oversight of federal spending. With the economic expansion that followed World War I, these reforms contributed to another string of federal surpluses, which gradually whittled the public debt back, to only $16 billion by 1930.

The depression that followed, with a sharp decline in federal revenues and the increase in expenditures that accompanied New Deal programs, led to new deficits through the 1930s. Those deficits were moderate compared with the staggering deficits of World War II, which totaled $211 billion dollars through six war years. Once again a massive war took the federal budget problem to an unprecedented level. Once again the response of Congress was to attempt a reform that would consolidate and tighten up its spending process: a federal legislative budget proposed, and passed, as part of the overall Legislative Reorganization Act of 1946.

The legislative budget did not last, and the era following World War II was marked by attempts on the part of government to adjust to a very new and complex economic and political situation, that of post-New Deal and postwar America. Even though federal outlays dropped after World War II, they were still far greater than they had been before the war. In 1952, for example, federal spending was $67.7 billion—compared with only $9.5 billion in 1940, the year just before the war. The Legislative Reorganization Act of 1946 had dramatically reduced the number of committees in Congress and had provided some restraint on logrolling; but the activist programs of presidents, combined with economic conditions and congressional spending habits, led to several years of deficit to go with periodic surpluses during the late 1940s and 1950s. In dollar terms, the gross federal debt grew during these years, but, with economic expansion, it declined considerably as a proportion of gross national product. The national debt on the eve of the depression was $16.8 billion, or 33 percent of GNP; by 1940, on the eve of our entry into World War II, it was $43 billion, or 43 percent of GNP; in 1946, after the economic drain of the war, it was a staggering $269 billion, or 128.5 percent of GNP. Through congressional restraint on expenditures, however, the debt declined steadily to $253 billion, or 98 percent of GNP, in 1949; with continued restraint and economic growth, it was down to 56 percent of GNP by 1961.

In sum, a historical overviews of government spending, governmental actions, and government deficits from the beginning of the American republic to the 1960s shows a strong concern in government about spending restraint and fiscal responsibility, with overall results that match. Our national debt to this point was built very largely on intervals of war. Without the deficits caused by the War of 1812, the Mexican War, the Civil War, and the Spanish-American War, the federal government would have had a $1.6 billion surplus at the beginning of the twentieth century. Without the deficits caused by the two world wars, it would have a gross debt of under $30 billion—or less than 5 percent of GNP—in 1961. When faced with the fiscal crises caused by war, American policy makers found ways, through institutional devices and internal control, to create budget surpluses and retire substantial portions of the colossal debt they had incurred through war expenditures.

Since the 1960s, however, we have seen a somewhat different pattern of politics and economics. In the quarter-century since 1961, we have had only one year of surplus—a relatively modest $3.2 billion in 1969. In all other years the federal government has run deficits, and the volume of deficits has grown, particularly during the administration of Ronald Reagan. From 1960 to 1980 our national debt grew from $293 billion to $993 billion; in the first Reagan term it nearly doubled again. Despite signs that Congress has responded to this budget stress much as it has in the past—for example, by enactment of the Budget and Impoundment Control Act of 1974 in the aftermath of the Vietnam War, a reform that once again consolidated and centralized budget authority in Congress—we have become increasingly critical of our policy makers, especially Congress. In the Reagan years particularly, attacks on Congress and sweeping proposals for constitutional revision to restrain Congress have increased dramatically.

The concern over deficits and their political causes is understandable; our contemporary situation is unprecedented, particularly in the last several years, when ballooning deficits have in no way been caused by a large-scale war. But is the problem an institutional one, most particularly a congressional one? Can sweeping institutional change that would limit the powers of Congress solve these problems? It is to these questions that I now turn.

### CONGRESS, THE PRESIDENT, AND DEFICITS: FROM THE 1960'S TO THE 1980'S

The contemporary problem of deficit spending dates from about 1965—the beginning of Lyndon Johnson's elected presidential term. The causes were a combination of stagflation, Great Society programs, and the Vietnam War. In the early 1960s budget growth was relatively low; from 1960 through 1966 it averaged only 2 percent a year. But from 1966 to 1970, the Johnson years, the average was 10 percent. Contemporary wisdom would have it that this was Congress's fault, but even a cursory glance at the data suggests a different interpretation. Certainly Congress agreed to the increased budgets of the Johnson years, often (especially in the Eighty-ninth Congress) with enthusiastic support for the new Great Society programs. But growth in the late 1970s was greatest in national defense, averaging 12.1 percent, to only 7.3 percent in other federal expenditures. Congress was much less enthusiastic about defense increases. The engine of rapid governmental growth was President Johnson's driving demand for guns and butter together. Congress was certainly an accomplice—but the president was the mastermind. No doubt, as analysts have repeatedly stressed over the years, Johnson's desire to have his cake and missiles too encouraged the stagflation that bedeviled us for over a decade and, by depressing tax receipts, worsened our deficit problem.

Although today's deficit problem dates from the Johnson years, the economic difficulties triggered by Johnson's policies did not alone create it. Nor did we come to our current state of affairs through simple accident or inadvertence. A number of conscious policy decisions, some in the 1970s and others in the first year of the Reagan presidency, created the large and growing gap we now face between federal revenues and federal expenditures. Once again Congress has been an accomplice. But once again the problems can be traced, at least in part, to other sources as well.

One key decision, reached in the wake of the Johnson Vietnam policy and concurred in by the public and the Congress, was to make a major change in priorities, sharply away from defense and toward social spending. In fiscal 1966 outlays for national defense totaled 40.7 percent of the federal budget. A decade later, through actions taken by Presidents Richard M. Nixon, and Gerald R. Ford in concert with the Congress, defense had dropped to 24.5 percent of the budget. Concomitantly, of course, domestic spending proportionately rose—especially spending for benefit payments to individuals. These payments, popularly labeled entitlements, went from 26.9 percent of budget outlays in 1966 to a staggering 48.5 percent in 1976. Entitlements, especially social security, rose absolutely and comparatively throughout this period, but the greatest increases came in the first term of President Nixon. The Democratic Congress, competing with Nixon for political advantage, under intense pressure from interest groups and public opinion, and spurred by the political ambitions of Chairman Wilbur Mills of the Ways and Means Committee, increased social security—the largest entitlement by far—in 1969, 1971, and 1972 by a full 45 percent (20 percent in 1972 alone). These huge increases were double the cost of living.

The increases also gave individual members of Congress a political advantage. Nevertheless, in 1973 Democrats and Republicans in Congress, concerned that the entitlement programs were getting out of hand, joined to tie social security to the consumer price index. They did so both to save money and to insulate the process from intense special interest pressure. In so doing, they fulfilled a pledge made in the 1968 Republican party platform. They also recognized full well that indexation of social security would inevitably lead to indexation of other entitlement programs. This decision came at some considerable long-term cost to the individual members of Congress. Lawmakers voting each year or two on a cost-of-living increase for social security could go back home and claim credit with elderly citizens for a concrete action taken in their behalf. Making the increase automatic through indexation removed that advantage.

The motives for indexing entitlements, then, were largely positive and fully consistent with the long history of congressional concern for out-of-control spending. As inflation took over under President Jimmy Carter in the late 1970s, however, the consequences of indexation were not positive. Benefits, now beyond the reach of normal congressional discretion, increased at an accelerating pace. So, too, did interest rates and thus federal expenditures for interest on the national debt, which, of course, was also outside direct congressional control. These increases, combined with a faltering economy, gave rise to contentiousness over the fate of the dwindling elements left in the federal budget that could be altered directly each year.

In sum, by the end of the 1970s—the end of the Carter years—we had a defense budget that had dropped dramatically over a decade as a share of the total budget, a domestic budget that had risen sharply at the same time, especially in entitlements and net interest, and sharp conflict over these and other budget priorities—all fueled by a sagging economy. The budget deficit was viewed by politicians as only one of several problems. It was not seen as uncontrollable or even worsening, mainly because high inflation had cushioned it, swelling tax revenues more than increased budget outlays and cheapening the value of the dollars in the national debt.

To his credit, President Carter tried in both 1979 and 1980 to grapple with many of these problems. He proposed significant increases in defense spending and significant cuts in the domestic arena, while pledging to move toward balancing the budget. Congress, though preoccupied with the political fallout of these economic problems, nevertheless responded. In 1980, relying in part on reconciliation—a device created in the 1974 Budget Act—Congress took a series of painful actions to accommodate the Carter goals.[3] But Carter's sentiments and the actions he proposed were clearly not enough. They made him ever more unpopular within the Democratic party and were not convincing enough to the electorate at large.

To be sure, the problems of the 1960s and 1970s were not just the result of poor economic performance, presidential programs and misfeasance, and such noble but misguided actions as indexing entitlements. Congress itself contributed to the deficit problem, through institutional reforms that removed many of its traditional restraints on federal spending. Since the 1920s—the period following the major reforms, which included the Government and Accounting Act of 1921—Congress had relied on tough-minded, institution-oriented, and strong-willed Appropriations committees to put brakes on the natural political impulses to spend more money for individual political advantage. During the 1940s and 1950s such important Appropriations Committee chairmen as Representative Clarence Cannon (Democrat, Missouri) and Senator Carl Hayden (Democrat, Arizona) erected internal incentives and restraints on their committee members to keep the committees acting as guardians of the federal treasury. But reforms in the late 1960s and early 1970s diluted the role of the Appropriations committees and, by democratizing and decentralizing power to a large number of subcommittees, to rank-and-file members, and to staff, removed many of the existing restraints on the growth of Federal spending. Individual members and subcommittees, leb by entrepreneurs seeking political advantage, reputation, and power, came up with new ideas for more spending and accelerated the problems of the 1970s. But although these congressional reforms have contributed to the growth in spending, their effect has been relatively small compared with the magnitude of the problem. The largest single policy result of congressional reforms during this era was an expansion of economic regulation, not of concrete spending programs.

Regardless of the cause, actions of the federal government and the course of the economy in the 1970s aroused growing public discontent. When the American public chose Ronald Reagan on November 4, 1980, they were signaling their displeasure with the economic performance of Carter and Congress and their desire for a change. Public opinion surveys tell us that substantial public support existed for the three main legs of the Reagan economic program—more defense, less domestic government, and reduced tax burden. But there was also deep public support for a continuing strong federal role in nearly every area of public policy (save welfare and foreign aid) and evidence of public willingness to accept sacrifices—including taxes—to solve our economic difficulties, such as a deficit projected to reach $60 billion in President Carter's last budget year. Overall, clearly, the public wanted a change in 1980 but was willing to leave the specifics up to its political leaders.

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[3] Allen Schick, "Reconciliation and the Congressional Budget Process" (Washington, D.C.: American Enterprise Institute, 1981).

Ronald Reagan took that mandate for change and moved swiftly in 1981 to implement his program: sharp increases in defense spending; slowdowns and some significant cuts in domestic spending (except in entitlements); and deep tax reductions, led by a 25 percent across-the-board cut in tax rates over three years. Assisted by yeoman work and shrewd strategy by his key lieutenants in the newly Republican Senate, Reagan was able to move his budget plan nearly intact through the Senate early in 1981. Virtually perfect Republican unity and some key Democratic votes gave the president budget victory over the House and its Democratic leaders by midyear.

The House Democratic leaders were stung by Reagan's successes—and their defeats. They were determined to avoid further humiliation when the tax component of the Reagan plan came up for consideration in July or August 1981. Chairman Dan Rostenkowski (Democrat, Illinois) of the Ways and Means Committee tried to achieve a compromise with the president's forces but was rebuffed. So Rostenkowski, encouraged by Speaker Thomas P. ("Tip") O'Neill, began to develop his own taxcut alternative. Eager to win at all costs, the House Democrats put together a package incorporating most of the Reagan plan, while adding additional tax breaks attractive to conservative Democrats and Republicans: greater depreciation, reduction of maximum taxes, indexing of brackets, and other components. Reagan's forces retaliated by sweetening the pot with even more tax cuts to lure back natural allies. The bidding was intensified through the summer; in the end, however, the president once again prevailed. The "victory" meant a much deeper tax cut than originally envisioned.

There was an electricity in Washington and around the country during 1981, but it has little to do with substance. The question was, Would Reagan win or lose? Many Democratic and Republican legislators, along with serious economists and other observers, were raising serious questions about the Reagan program, especially about the combined cumulative effect on future federal deficits of deep tax cuts, large defense spending increases, and modest domestic spending reductions; but the questions were largely lost or ignored in the uproar over who would win. The rhetorical response from the White House reinforced the rosy economic assumptions and projections of the Office of Management and Budget: no need to worry, the tax cuts will raise more revenue than they will lose, and the package will stimulate instant economic boom, sustain prosperity, and bring a budget surplus by 1985. The same public arguments were made during the taxcut battle, although they were a sideline to the clash of wills between Reagan and the House Democratic leadership. "It had nothing to do with good or rational public policy; it was simply a macho contest between Reagan and Tip O'Neill," said one disgruntled observer at the time," and it really compunded the deficit."[4]

The deep tax cut did compound the deficit. And behind the scenes the people around Reagan clearly knew that it would. In the middle of the tax-cut war, a key Reagan lieutenant candidly assessed the situation:

"We're well aware that tax cuts at the level we're discussing will add tremendously to future deficits. Most of us, to be frank, don't buy the exteme supply-side line. Regardless, Reagan's main goal is not to balance the budget—it is to reduce the role of government. How do we best do this? In our view, if we don't cut taxes and generate big deficits, spending will never come down. Congress will just spend the revenues and more . . . but with huge deficits, their choices are tougher . . . they'll have to cut spending.[5]

President Reagan may have believed that the more massive the tax cuts, the greater the ultimate revenue gain (although his belated support for large tax increases in 1982 and 1984 belies that notion). More likely Reagan, too, saw the specter of mammoth deficits as a price worth paying to get Congress, under extreme duress, to cut government.

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[4] Comment to author.

[5] Interview with author.

Of course, the president and his lieutenants were wrong, and for several reasons. First, the public mandate for change—with details left up to the political leaders—would clearly be short-lived (as any major mandate for change has been in American history). In 1981 public sentiment was to give the president a chance and never mind the details, but it was evident that this sentiment would fade and the details would sharpen by 1982. Interest groups caught off balance by Reagan in 1981 would by the next year be better able to mobilize. They did—and stiffened Congress' resolve against further deep domestic cuts.

But it was not simply, or primarily, special interest pressure or congressional stubbornness that brought domestic budget cutting largely to a half by 1982. Public opinion also played a role. Budget director David Stockman, early in 1984, put it best:

"People want to have mass transit subsidies and middle class subsidies for education. And the agricultural sector wants all those benefits . . . You are now at the point where you are reaching the legislative hard core of the budget. The budget system is not the problem. The problem is that this democracy is somewhat ambivalent about what it wants. It wants low taxes and substantial public spending. [6]"

In the same interview Stockman made clear the consequences of the limits of public tolerance for spending cuts. When he was asked about the Reagan administration's goal of cutting federal spending to 19 percent of GNP, he commented, "The minimum size of government achievable appears to be 22 percent to 23 percent of GNP." [7]

The Reagan administration can perhaps take credit, as Stockman noted, for keeping federal spending from going above 25 percent of GNP as it would otherwise have done, but the key point is that the administration deliberately helped to negotiate a tax package that simultaneously brought federal revenues down to 19 percent of GNP. Whether the administration's "plan" for domestic spending cuts in 1982 and beyond failed through miscalculation, overoptimism, or sheer folly, the result, built into the Reagan policies, was a chronic and huge deficit problem.

Washington policy makers, it is true, did not deal sweepingly or effectively with this problem in 1982 and beyond. But once again the blame could not be laid in major part at the feet of Congress. Congress, to its credit, began to grapple on its own with each of these areas. In taxes and defense, at least, the president was of little help. In 1982, after his unrealistic first budget proposal was rejected across the board in Congress and after the collapse of the informal budget negotiations known as the Gang of Seventeen, President Reagan essentially withdrew from the budget policy process. The Republican Senate moved in unilaterally to fill the policy vacuum. It passed its own budget, calling for smaller defense increases than the president had requested and building in a tax increase that he had flatly opposed. It is true that the president belatedly endorsed both budget and tax proposals, helping to steer them through the Democratic House of Representatives. But it was Congress, in an approximation of congressional government, that defied conventional wisdom in an election year by slowing defense and raising taxes to reduce the deficit.

Late in 1982, Congress and the president acted together to save social security, legislating a major plan that raised social security taxes and shaved future benefits. At the same time, of course, the plan reduced future deficits from what they would otherwise have been. (Moreover, it included a delay in cost-of-living adjustments in social security that would inevitably lead to similar delays in the other entitlement programs and thus reduce deficits further.)

In 1983 Congress initiated an energy tax increase. In 1984 the Republican Senate once again moved into a policy vacuum, proposing a "down payment" on the deficit, including another significant tax increase, which the president once again belatedly endorsed.

These actions may be too little, too late. But in the absence of strong presidential economic leadership, in the face of presidential opposition to tax increases or defense slowdowns, and in the absence of any strong mandate comparable to that of 1981, it is surprising that any significant actions at all were taken in 1982, 1983, or 1984.

In 1984, although Congress did no more than propose and implement another incremental down payment on the deficit, it took other steps intended to set the stage for more significant action in 1985 and beyond. Proposals were floated that were designed not to be implemented immediately but to be injected into the policy debate for future use. The most significant of these was the budget freeze, proposed by a triumvirate of senators who spanned the ideological spectrum, from liberal Democrat (Joseph Biden, Delaware) to centrist Republican (Nancy Kassebaum, Kansas) to conservative Republican (Charles Grassley, Iowa). These senators proposed that the budget for fiscal 1985 be frozen at the level of the 1984 budget. The freeeze was attacked from many quarters, including the White House, which noted its dramatic effect on the defense budget. But it was widely viewed on Capitol Hill as a device that could be explained more easily than selective budget cuts to a wide range of Americans and perhaps be accepted by them. As one participant noted at the time, "The freeze means fairness. I can tell my constituents nobody suffers very much—everyone simply gets what they got last year—and the burden is borne to some degree by everybody.[8]

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[6] Interview with David Stockman, Fortune, Feb. 6, 1984.

[7] Ibid.

Although the freeze was ignored in the budget battles of 1984, it was an idea that was certain to rise again when Congress was ready to take more serious action on the budget and the deficit in 1985. One reason was the deficit-related debate that dominated the 1984 campaign—especially the presidential campaign. During the campaign President Reagan directly and explicitly precluded any changes in social security benefits or outlays for current or future recipients. That pledge, combined with firm pledges not to increase taxes and to continue to push for defense increases comparable to those requested in the past (14 percent or more in real terms), doubled the difficulty faced by Congress in grappling with the deficit, especially on the spending side.

Walter Mondale's campaign ploy of pledging a tax increase to deal with the deficit and challenging political debate on that basis further complicated the prospects for 1985. Mondale made taxes a centerpiece of the campaign and forced the White House to take a much explicit stance against a tax increase for political purposes, than it would otherwise have liked. It also altered the tactics for congressional campaigns, precipitating a nationwide Republican congressional television advertising campaign that focused on one theme: Democrats in Congress will raise your taxes; Republicans will not. This theme hardened Republican positions against tax increases and forced many Democrats, in the heat of election campaigning, also to pledge not to increase taxes.

In the days after the election, most politicians faced the new reality. The deficit was still there; the president's theme that economic growth would eliminate the problem was accepted by fewer and fewer observers; and the savings available in direct budget cutting—given a large defense increase and exemption from cuts of the largest domestic program by far—were clearly not enough to take care of the deficit problem.

The stage was set for confrontation on domestic spending, a confrontation that would be over the same areas of spending about which President Reagan had clashed with Congress in 1981 and throughout his first term. But political forces in Washington were searching for devices to move the battleground beyond those increasingly fruitless political disputes to a common ground that would yield larger savings and broader action to grapple with out-year deficits.

The problem was complicated by the political dynamics of a two-term president in his fifth year. Two-term presidents since the Twenty-second Amendment to the Constitution have started their final terms at a political disadvantage, whatever their reelection margin. The disadvantage begins with the lame-duck status of the president and is reinforced by the political dynamics of the off-year election to take place two years hence. For many reasons, including the six-year senatorial terms, the way congressional candidates are recruited, and the typical pattern of economic performance, the election in the sixth year of a two-term president almost inevitably results in significant losses for the president's party in both houses of Congress. For 1986 Republicans face the prospect of having many more vulnerable Senate seats than the Democrats (twenty-two to twelve), largely because of the great Republican success in the Senate in the sweeping Reagan victory of 1980. Democrats who held Senate seats in that Republican year are not likely to face as severe a challenge six years later, many Republicans who won needed the boost of an enormous Reagan tide, a boost that will be absent in 1986.

Republicans in the Senate will be particularly nervous about the political prospects of 1986, therefore, particularly concerned about protecting their own electoral interests first, and considerably more independent of the president and his desires than they have been in the past. They want action now that will preclude an economic disaster in 1986.

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[8] Comment to author.

All these difficulties suggest the need for quick steps on the deficit, a need that has been acknowledged by the overwhelming majority of lawmakers. The likelihood of quick action is enhanced by the scarcity of other significant items on the political agenda for 1985. Before the end of November 1984, lawmakers were searching for an appropriate way to put together the package that many, if not most, acknowledge is necessary: a combination of domestic spending slowdowns, reductions in the rate of increase of defense, and tax increases.

Clearly, the president's commitment to tax simplification and the Treasury Department's tax reform proposals were bound together in this process of negotiation and strategy. At this writing, in late November 1984, no explicit vehicle, like a bipartisan commission on the deficit, a bipartisan commission on tax simplification or reform, or an informal working group such as the Gang of Seventeen, had emerged. But with the selection by Senate Republicans of Robert Dole (Kansas) as their new majority leader and the related accesssion of Robert Packwood (Republican, Oregon) to the chairmanship of the Senate Finance Committee, the Republican Senate was controlled by men who set their first priority on deficit reduction and who have made clear their preference in the past for a combination of spending reductions and tax increases. And the early maneuvering after the election suggested that, as in 1982 and 1984, the Congress, most particularly the Republican Senate, would be likely to take the lead in acting to reduce the deficit, pulling a reluctant president along.

### IS CONGRESS TO BLAME FOR THE DEFICIT?

The history I have recounted suggests that Congress, though a key participant in budget decisions, is not inherently inclined, for political reasons, to spend federal dollars at will or to pile up injudicious deficits. Still, a substantial literature in political science casts doubt on Congress's institutional abilities, given the demands and incentives of its individual members. Political scientist David Mayhew, in his classic book Congress: The Electoral Connection, eloquently described the kinds of parochial, particularized benefits reelection-minded legislators would seek—and we regularly see them doing to on the House floor.[9] Kenneth Shepsle and Clifford Hardin of Washington University in St. Louis have further claimed that the contemporary rise of subcommittee government, by reducing the internal restraints that had earlier existed in Congress, has greatly exacerbated the spending problem.[10]

Although both lines of argument are credible, a wholesale acceptance of them would lead us to expect congressmen to have increased the share of pork-barrel type programs in the past few years and to have at least protected these beneficial programs for the future. The opposite is true. By indexing first social security and then other entitlement programs, congressmen consciously reduced their ability to use federal budget dollars in the interests of their reelection. In the future, as entitlements grow automatically, defense skyrockets, and the interest on the national debt accumulates, the share of the budget devoted to the rest of government—which includes most of the items we think of as special interest or parochial pork—will decline markedly.

Consider the component parts of the federal budget from 1966 to 1986. Grants to state and local governments together with other federal operations—the category that includes the programs congressmen can boast about when they run for reelection—constituted 25.3 percent of the budget at the height of the Great Society. Entitlement indexing began in 1973; by 1976 other domestic spending was only 19.7 percent of the budget; in the first Reagan year, it was down to 17 percent; by 1986 it will be less than 14 percent. The number, in other words, has regularly and significantly declined. In short, Congress has directly and greatly reduced the areas where congressmen could use spending to their individual advantage. As political scientist Douglas Arnold has noted, Congress has moved dramatically in the past two decades toward formula grant programs that remove the discretion from individual congressmen to affect or claim credit for particular benefits.[11] Economist Gardner

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[9] David Mayhew, "Congress: The Electoral Connection" (New Haven, Conn.: Yale University Press, 1974).

[10] Kenneth Shepsle and Clifford Hardin, "Government by Subcommittee," Wall Street Journal, June 24, 1983.

[11] R. Douglas Arnold, "The Local Roots of Domestic Policy," in Thomas E. Mann and Norman J. Ornstein, eds., *The New Congress* (Washington, D.C.: American Enterprise Institute, 1981), pp. 250-87.

Ackley offers additional, macroeconomic evidence that raises doubts about the thesis that our government structures inevitably swell federal programs and national debt.[12]

The Congress of the United States is not, of course, a selfless and noble institution. Members of Congress have other ways to secure their enormous electoral advantages. Defense has become a major focal point for particularized benefit giving, a direction encouraged by actions taken by major military manufacturers in the private sector. Rockwell International, for example, explicitly ensured that subcontracts for the B-1 bomber were spread to nearly every congressional district, so that Congress would view funding for the bomber favorably and would see electoral debits in cancellation or slowdown. Moreover many members of Congress have found that the tax code, through tax expenditures, is an efficient and little noticed way to spread benefits to important groups and to keep economic perquisites flowing to constituencies.

Nevertheless, a look at the components of the federal budget shows a decline in constant dollars through the 1980s in domestic spending other than social security and Medicare, great increases in formula programs, and reductions in growth of the so-called pork-barrel programs. These facts must give pause to those who would place all blame for federal spending increases and expanding deficits on the venal political habits of individual congressmen.

A closer look at our political institutions and relations casts doubt on the efficacy of some of the major proposals that have been advanced to clean up our deficit problems once and for all. Institutional devices can matter, and, as we have seen, Congress has repeatedly responded to budget stress through internal reform, usually to centralize its own budget processes. When public attitudes and larger events—like a demand for spending or a change in priorities or a large war effort—do not intervene, these institutional devices can be meaningful and important. But some work better than others.

For many decades the main institutional device Congress relied on to limit deficits was the requirement of periodic votes to increase the national debt limit. This device had been expected to restrain spending and force Congress to pay serious attention to growing deficits. But, driven by the demands of presidents and limited by the constraints of public and interest group pressure, Congress has viewed the votes on the debt limit largely as nuisances. When for any reason Congress has been unable to agree to increase the debt limit, a game ensues in which the government comes perilously close to being brought to a halt, until common sense prevails and the limit is finally raised. Indeed, this device has proved to be a wonderful way for many members of Congress to eat their cake and have it too: voting consistently both against increases in the debt limit, to demonstrate to their constituents their concern for fiscal responsibility, and for programs and appropriations that increase federal spending and the debt, thus requiring the votes to increase the debt limit.

The proposal for a constitutional amendment to balance the budget has served a similar purpose for many politicians. It enables proponents to show how deeply concerned they are about federal deficits without having to propose or vote for the specific programs that might bring the budget into balance and therefore incur the wrath of the large majority of Americans who are protecting most existing federal expenditures from the legislative scalpel.

Some limited reforms would help; I return to them at the conclusion of this essay. But the history of budgeting in America suggests that constitutional change would be both unnecessary and ineffective, and perhaps even detrimental.

## INSTITUTIONAL CHANGE AND THE DEFICIT

So far I have tried to debunk the conventional wisdom that lays the blame for outrageous deficits and uncontrollable spending entirely at the feet of an irresponsible Congress. A serious movement, however, is afoot to deal with this problem through institutional change that would curtail the power and the role of Congress.

One major proposal that was a dominant theme of the 1984 presidential campaign is a constitutional amendment to give the president line-item veto authority. President Reagan first framed the issue in his 1984 State of Union message:

"Some 43 of our 50 states grant their governors the right to veto individual items and appropriations bills without having to veto the entire bill . . . It works in 43 states. Let us put it to work in Washington for all the people.

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[12] Gardner Ackley, "Leviathan Revisited: Macroeconomic Evidence on the Relative Size of Government," *Rackham Reports* (Fall 1984).

"It would be most effective if done by constitutional amendment. The majority of Americans approve of such an amendment, just as they and I approve of an amendment mandating a balanced federal budget. Many states also have this protection in their constitutions.

Throughout the campaign President Reagan and Republican senators and congressmen made the line-item veto a major theme, they suggested that the president could deal with the deficit if only he had the tools—that the most effective, most efficient, and least onerous way of dealing with federal spending is through a constitutional amendment to give the president line-term veto authority.

As a political theme this is an understandable one. But its main drawback, as the preceding pages demonstrate, is that it starts with the basic premise that the president is better than the Congress at controlling government spending. A line-item veto would give the president more authority and take away some of the basic powers that have resided in Congress since its beginning.

There is a fundamental flaw in this premise. Over time any executive-centered political system will almost certainly spend more and enlarge the scope of government more than one with substantial legislative power; witness the fate of nearly all our Europeans allies that rely on parliamentary systems with strong executives and weak legislatures. Compared with nearly all of them, the United States, in size of government and taxation as a proportion of GNP, is small indeed. Political scientist Michael Malbin, after a recent visit to France, made the point especially well:

"The French budget system clearly favors the executive. Party discipline rules our log-rolling, and voting on the budget by department cuts down on localism. But one thing the system does not do, according to figures complied by the Organization for Economic Cooperation and Development, is to produce a lower rate of government budgetary growth in France than in the United States. For 14 of the 20 years from 1961 to 1981, under Presidents Charles deGaulle (1958–1969), Georges Pompidou (1969–1974), Valery Giscard d'Estaing (1974–1981) and Mitterand, government spending went up at a faster rate, as a percentage of gross national product, than it did in the United States in the same period."[13]

The line-item veto, of course, is more a political ploy than a comprehensive proposal for reducing or eliminating deficits. For one thing, the veto as proposed aims exclusively at appropriations bills, while most spending, as the Office of Management and Budget has pointed out, is not directly in the hands of the Appropriations Committee or funneled through individual appropriations bills. Consider, for example, the $926 billion in the 1985 fiscal budget. Some $188 billion goes for social security, handled separately through social security legislation. Another $116 billion is for net interest payments, which the president could not item-veto. Medicare and Medicaid get $90 billion, also handled through formulas; the formulas can be changed by law but the items in the existing law are virtually immune from veto. Another $123 billion if for other mandatory programs handled through existing legislation. Commitments made in prior years for which contractual obligations exist total $97 billion for defense and $74 billion for domestic programs. We are left with $237 billion—but $175 billion of that is for defense. That leaves, in other words, $62 billion in nondefense, discretionary spending as the main potential for line-item vetos. That includes the general operating expenses of the federal government—Central Intelligence Agency, Federal Bureau of Investigation, the mint, the national parks, and so on. A very small proportion of those expenses could be effectively vetoed if the president had the desire.

Most presidents, however, including Reagan, do not really have that desire. Driven by the same political considerations as members of Congress, presidents generally support, even when they have an opportunity to veto, the kinds of programs that clearly stand out as wasteful federal spending. One very solid example is the subsidization of electric power in the West, Reagan's strongest political base and the base of his closest supporters. Time after time, when bills calling for continued large federal subsidies of power rated in western states have been sent to the president, he has, without protest, signed them and, with conservative Republican senators and congressmen, taken credit for them. He has done the same thing with subsidized grazing lands in western states. Even a lame-duck president, ineligible for reelection, will not chance damage to his political base.

President Reagan is also not immune in other areas. He has supported nearly all the water projects that Jimmy Carter tried to veto when he was president. He supported the Clinch River Breeder Reactor. He supported swollen farm subsidies and generous farm loan guarantees. And during the campaign he pledged to protect the benefits not only of existing social security recipients but also of future recipients. These are not the habits of a president who would wield the item-veto pen mercilessly.

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[13] Michael J. Malbin, "Plus Ca Change," *National Journal*, Apr. 14, 1984, p. 729. See also Ackley, "Leviathan Revisited."

I do not mean to single Reagan; he has been more courageous than nearly any other president in modern memory in attempting to cut back domestic federal spending. The problem is not President Reagan—it is presidents in general. Every president, including Reagan, wants to make his mark on the country. Some signficant part of that mark depends on proposing new programs and allocating resources for them. Part of Reagan's ambition has been to strengthen our national defenses, and he has pushed hard for the additional federal dollars to do so. These dollars may be justified; they are federal spending nevertheless. Moreover, Reagan has proposed such new deficit enhancers as tuition tax credits, enterprise zones, and a permanent manned space station.

Presidential power—in whatever form—will be used to advance all presidential interests. That means, ironically, that the line-item veto, over the long run, would probably increase spending, not cut it. Beyond any doubt, if the line-item veto had been available to President Reagan in 1984 when the MX missile was under fire in Congress, a number of calls would have been made to recalcitrant legislators from the White House, suggested that a faovred or federal building would be item-erased if the lawmaker did not reconsider and support funding for the MX. We would have paid for all those dams and buildings—along with more MXs.

Moreover, there is little to the claim that the item veto exists and has worked well in forty-three states. States, of course, are different; comparing the role, powers, and range of state governors and legislatures with those of the president and Congress is like comparing apples and oranges. Additional powers might well be desirable for state governors, who do not have the sweeping responsibilities in foreign affairs, among other areas, that the president has. Still, we have significant evidence that the line-item veto is not very effective in the states. As Benjamin Zycher has noted in the *Wall Street Journal*, per capita spending in the seven states whose governors lack line-item veto authority is no higher—and in some is lower—than in states with some form of line-item veto. After a systematic look at state and local spending patterns, Zycher concludes that the data "do not support the conclusion that the item veto power provides an effective constraint on government spending." [14]

Put simply, the problem is not an institutional one—it is a political one. No institutional solution, from a constitutional amendment to balance the budget to a Congress-crippling device like a line-item veto, will solve a long-term deficit problem. Indeed, a "solution" that would weaken Congress only to strengthen the presidency would be more likely, over the long run, to exacerbate the problem. A political problem requires a political solution. The solution begins, naturally, in the two national political institutions: Congress *and* the presidency. This historical review makes it clear that, despite Congress' premier power over federal money, it rarely, if ever, takes significant sweeping policy actions without presidential pressure—or at least presidential concurrence. Presidential opposition to tax increases or budget cuts dooms them (so, too, of course, does congressional opposition). Thus give is needed on both sides to form a common ground for compromise. The best environment for this is *two* strong and confident institutions.

Some limited institutional changes might help ensure that our two political institutions are stronger, more confident, and more willing to engage in the kind of political compromise that can lead to control of the federal deficit. Congress can and should strengthen the hand of Appropriations committees, returning to them both the strong ethos to act as guardians of the federal treasury and the institutional tools to aid their decisions on their way through the House and the Senate. In the House of Representatives, some greater control by the chairman over Appropriation subcommittees positions and chairmanship would be desirable. So, too, would somewhat tighter rules under which appropriations bills are considered on the House floor, to discourage the wholesale practice of legislating on appropriations bills and offering dozens of amendments that are difficult to vote against politically and that add to spending pressures.

Some sensible and limited changes could also be made in the congressional budget process. The House of Representatives should abandon its practice of rotating membership and chairmanship on the Budget Committee, the only committee on which it does so. The Budget Committee has no chance of developing either a core of experienced and continuing legislative support or the enduring bipartisan relationships that could make the passage of a budget resolution more likely. The Senate could enforce its rules limiting membership on committees so that the Budget Committee would become more of a core assignment for its members, instead of being third or fourth among the four or five committees that most of its members serve on. Eliminating the two-step budget resolution process and adopting a single binding budget resolution would also be useful.

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[14] Benjamin Zycher, "An Item Veto Won't Work," *Wall Street Journal*, Oct. 24, 1984.

Both the president and Congress should explore the possibility of more frequent bipartisan commissions or informal working groups early in the budget season, to seek a broad consensus on the rate of growth of big domestic programs and of defense as well as on the need, if any, for a tax increase. If broad guidelines can be agreed on early in a process of give-and-take among both parties, both houses, and both branches, it will be at least somewhat easier to enact a budget that incorporates restraint in all spending and revenue areas.

As with any fundamental political problem in America, however, the solution begins not with the institutions but with the public. Public pressure for urgent action and public agreement to waive deep-seated individual policy preferences for a greater goal are necessary conditions for meaningful action on the deficit. When that public response emerges, we are likely to see both significant tax increases and budget slowdowns.

The public response is conditioned by the response of opinion leaders, who are no doubt partially responsible for the flaccid state of public opinion. If a Treasury secretary proclaims across the country that deficits do not matter, or a president blames an increase in the prime rate solely on the Federal Reserve, or Wall Street sends a mixed message about the deficit and the strength of the economic recovery, we will not find an aroused public demanding drastic action by policy makers to eliminate future deficits.

The CHAIRMAN. Well, gentlemen, we are very grateful to you; you have suggested some additional points that have clearly evaded the congressional witnesses who preceded you.

The blackmail question is a serious one, because the items of individual interest to individual Members of the Congress will be clearly identifiable, so that a clear beneficiary of this law will be the White House liaison. They will have a whole new set of arrows in their quivers.

Dr. ORNSTEIN. And relatively small in their individual dollar amounts but of such significance to individual States that they can be used as great leverage.

The CHAIRMAN. That's right, it may be a petty amount.

Dr. ORNSTEIN. Right—to get more spending for the things that the President wants.

The CHAIRMAN. The dollars may be relatively insignificant. Let me just ask one question that keeps bobbing around close to the surface—we've never quite harpooned it yet. Under the provisions of Senate bill 43, would legislation on an appropriations bill be subject to this individual veto process?

Dr SCHICK. Yes.

Dr. FISHER. It depends where it is placed; if it is placed in the back under the numbered sections, it would be isolated there, it would be polled out as a separate bill—it would be very clear. On the other hand, if it's put inside an unnumbered paragraph, it would have to fall with the whole appropriation.

So it would all depend on the structure of the appropriations bill.

Dr. SCHICK. If an unnumbered paragraph contained both an appropriation of money and a legislative proviso, they would be tied together, and would have to be vetoed or signed in tandem. If one fell, so, too, would the other.

The CHAIRMAN. Then we would be creating a separate class of legislation. As far as general legislation is concerned, if you can get your bill passed as an amendment to an appropriations bill—let's take the revision of the Criminal Code for an example. If you could persuade the enrolling clerks to take that bill section by section and submit it as separate bills, you could get one part of the bill vetoed while other parts would stand, which is something that would not have happened if the bill had passed as a result of being reported out by the Judiciary Committee and adopted by the Congress in the normal course of business.

Dr. ORNSTEIN. Precisely.

Dr. SCHICK. You have now suggested one of the few potential beneficial side effects of S. 43. It would discourage legislation in appropriations bills.

The CHAIRMAN. Well, that is a consummation devoutly to be desired. It might almost persuade me.

Dr. SCHICK. But a price would be paid for it.

Senator FORD. That's the price.

Dr. ORNSTEIN. You have to do your cost-benefit analysis here, and I still think the costs outweigh the benefits.

Dr. FISHER. You might also encourage something else, since the Mattingly bill only applies to appropriations bills, whether they are regular or supplemental or continuing resolution. You might encourage people to fund programs not through appropriations bill but through nonappropriations bills.

Many people think of cutting the budget only through appropriations bills, but in fact we fund programs through either permanent appropriations or entitlement legislation or nonappropriations bills. This is a problem at the State level, to give the Governor item veto authority of appropriations bills, but then to circumvent that by going to nonappropriations bills.

There would be an incentive under the Mattingly bill to finance more and more programs through nonappropriations bills.

Dr. SCHICK. These might be deemed as special appropriations bills, which are covered by S. 43—and that's another gray area in S. 43, as to what it would cover.

The CHAIRMAN. At least it's a question.

Dr. SCHICK. Certainly.

The CHAIRMAN. Well, Dr. Schick, you raised some questions about the constitutionality—you weren't quite certain that this would meet the test of article I.

Dr. SCHICK. That's right. It seems to me that while the House manual would describe the role of an enrolling clerk as being clerical and not involving any matters of judgment, the task assigned in S. 43 would entail a great deal of judgment in taking an appropriations bill apart and separating it for purposes of presentation to the President. It could very well be that a court would regard this activity as an intrusion into the legislative process not contemplated by the Constitution.

Dr. FISHER. I did notice that Senator Mattingly in his floor statement, when he introduced S. 43, explained that he was building on the Gephardt rule, and that certainly is a precedent to show that the House of Representatives can take out the public debt from the budget resolution without any further action, place it in a joint resolution or bill, and it would be "deemed" to have passed the House.

So in a way that is a precedent, but here we are going a step further. Now we are saying something as an item that really never passed the House or the Senate, will be done so through the enrolling clerk.

So it builds on Gephardt, but I think goes a step beyond it. In this case neither House actually voted on that particular item.

The Chairman. Senator Ford?

Senator **Ford**. Let's go back to the enrolling clerk just a moment, if I may—and I am clicked on Senator Evans' testimony. Senator Evans says that investing new powers in an enrolling clerk—and I read from his testimony—"This line-item veto proposal directs the Senate enrolling clerk to divide appropriations bills into items which stand as separate bills." That gets back to the resolving clause and so forth. "A few suggest that this is granting these clerks new powers at the expense of Members of Congress." And he sets out three items here. "The Clerk of the House and the Secretary of the Senate currently share the responsibility to review bills and ensure accuracy with what was passed by Congress. Direction is then provided to the enrolling clerks."

Well, if we say that enrolling clerks don't have any new authority, we certainly give it to the Clerk of the House and the Secretary of the Senate, because then they will be instructing their enrolling clerks. That's one I don't think they can get out of—they say no, but then the power is still given to the Clerk and to the Secretary of the Senate to direct them.

Dr. **Schick**. The Secretary of the Senate and the Clerk of the House would have more power is because performing the task called for under S. 43 would require, in some instances, a rather great deal of judgment. This is amply illustrated by the continuing resolution passed last year. This is not an automatic easy process. Two informed people given that continuing resolution passed by the House and Senate and asked to perform the tasks called for under S. 43 might proceed differently. It is on this basis that I think S. 43 would either give them more power and enter into questionable constitutional waters.

Dr. **Ornstein**. With enormous substantive consequences, of course, for the different——.

Senator **Ford**. The point that I asked Senator Mattingly earlier: what if the clerks disagreed? So here what about the Clerk of the House and the Secretary of the Senate—what if they disagreed?

Dr. **Fisher**. There wouldn't be under the Mattingly bill, I think, disagreement because the breaking up of an appropriations bill would be done by the clerk where the bill came from, so if it came out of the House it would only be done by the House clerk; if it came out of the Senate, by the Senate clerk.

Senator **Ford**. Then we are subject to disagreement with what the Clerk of the House did—no, it would be after passage, though, wouldn't it? We would lose control of that bill, wouldn't we?

Dr. **Ornstein**. It would go to the Clerk of the House.

Senator **Ford**. After it was passed, before it would be sent to the President, the Clerk of the House, then, would break each one of those items down based on his or her opinion.

Dr. **Fisher**. But your point is well-taken, that this monster CR originated in the House. It is House Joint Res. 648.

Senator **Ford**. So the House would do all of that.

Dr. **Fisher**. That's right.

Dr. **Schick**. Let me read from this continuing resulution to indicate one type of problem; the Senator from Oregon referred to it in his testimony.

The continuing resolution says "The items in the Agricultural Rural Development appropriations bill which have not been passed into law, which were in House Report No. 98-1071, filed in the House of Representatives, shall be deemed as if such Act had been enacted into law."

This is one subsection of this continuing resolution. But the particular agricultural appropriation bill which is referenced here is divided into the types of unnumbered paragraphs and numbered sections referred to in S. 43. The enrolling clerk would have to decide: is that agricultural bill one item envisioned under S. 43 or divisible into many items?

That is a matter of considerable judgment and considerable import.

The Chairman. And if the Senator would yield just for a moment, that really in that context would become a legislative decision.

Dr. **Schick**. That's right—not taken by either Members of the House or the Senate.

The Chairman. But it would be a legislative decision which would be taken by the enrolling clerk who is not a Member of either House.

Dr. **Schick**. That's right.

Dr. **Ornstein**. One could argue that this would make the enrolling clerk the most powerful individual at least at this end of Pennsylvania Avenue.

The Chairman. I don't want to trespass on the Senator's time, but it does seem to me that this becomes the very heart of the constitutional question.

Dr. **Fisher**. I want to underscore what Allen said on this incorporation by reference, because if the enrolling clerk took his job most narrowly and just took that paragraph as it reads and put an enacting or resolving clause on the top, the President would have no discretion at all, because it's all by reference—everything is as it came out of the House or the Senate or committee; there would be absolutely no detail, no subject matter at all.

And I don't know if S. 43 would encourage more incorporation by reference and tie the hands of the President.

Senator **Ford**. Senator Hatfield is very concerned about things that are referenced in, and that this could very well sever that reference.

I asked this question of Senator Mattingly earlier, and I think you all have come on—and here is exactly what I said: "There would seem to be a serious question whether the scheme of enrolling as separate bills each project or program item for possible veto action would be a valid exercise of legislative power, since such 'separate bills' "—and I put that in quotes— "would not have been acted upon as separate bills by the Congress. And how could we be sure that such items out of the package would have, in fact, passed each House?"

I think therein kind of sums up your concerns, part of your concerns, and also mine from early on.

Dr. **Schick**. Let me go a step further. There is a distinction between the Gephardt precedent and this bill. Mr. Fisher mentioned the procedural difference, that the Gephardt bill at least is acted upon by the Senate. A more important consideration is that the matter to which the Gephardt procedure is subject is public debt; it involves the conduct of Government—it is Government dealing with itself.

When you deal with an appropriations bill, however, you are dealing, as the continuing resolution does with rights and obligations of individuals. Do affected persons have relief in court to sue as to the S. 43 procedure? There might be no possibility of an individual going to court and suing with respect to the Gephardt procedure—no standing whatsoever.

The continuing resolution has in it the Criminal Code. Suppose that the Criminal Code or parts of the Code, were stripped off and separately presented to the President? Can an individual subject to this Criminal Code go to court, have standing, and sue with respect to the legality of the legislation?

So there is a difference between the Gephardt procedure and S. 43.

Senator **Ford**. Mr. Chairman, I have no further questions. I am delighted at the testimony of the panel.

Dr. **Ornstein**. Could I just add one point, Mr. Chairman? I just wanted to add a point about the 2-year trial. We heard a lot about let's just give this a 2-year trial and we will see how it comes out, and if it works well, we will add it on.

I have real misgivings about that, because I think there is nothing clean and easy, as we have seen, about how this would operate. It isn't as if you were going to be able to go back and do a little ledger and see how much money you have saved. A lot of what would go on would be behind the scenes with Presidential-Congressional liaison, negotiating with individuals, and using this power to get more things put in.

We might see a couple of flashy instances where a President, for public relations purposes, wielded the item-veto pen and then said, "look at how I have eliminated a water project or a set of water projects, or whatever." That would be used clearly by the proponents of this to show how wonderfully it worked, but I don't think you would find an easy time coming up with a clean assessment 2 years down the road as to whether this worked. I think it's the camel's nose under the tent; before long, the entire camel with all it brings with it would be inside.

Senator **Ford**. There's another question, too: Would the President line-item veto more in his first term or would he veto more in his second term? And if he was restrained to help his Vice President become President, he may be restrained from line-item veto in his second term, and liaison between the White House and the Congress would be—probably you could see the trench go back and forth as a result of this, in order to "I will not do this to you if you won't do it to me."

And we could pretty well soon see the President saying "I don't want that ball, it's too much." And the pressure could be exercised just as easy from this end. As Senator Hatfield said earlier, when the President vetoed his bill, you know, and the Senate overrode the President 95 to nothing, that was a show that he knew or had to know, or his people had to know, that I am going to veto it, and that mean old Congress overrode me.

Dr. FISHER. I want to make a point about the constitutionality. Mr. Chairman, I think you are correct that Members do take an oath to support and defend the Constitution, whether you are an attorney or not an attorney, whether you are a specialist in constitutional law, doesn't matter; you have a responsibility——

The CHAIRMAN. You are not relieved.

Dr. FISHER. You can't just say let the courts decide this, because many courts will find certain decisions are just not in their jurisdiction either.

So I think you have a responsibility to decide constitutional questions on two fronts: One, the text of the Constitution, whether this procedure fits with article I; then a constitutional test of a different order, namely, your own judgment as to what this does to executive-legislative relationships and separation of powers and your own ability to set legislative priorities and defend your own prerogatives. And this is a responsibility that is exercised by each Member regardless of their legal background.

The CHAIRMAN. Let me ask this one last question—the same question I addressed to Senator Mattingly and Senator Evans.

And that is—let us assume that all of the objections that you have stated to S. 43 were resolved. Would you find that process markedly more effective or desirable than the rescission process?

Dr. SCHICK. I would respond by saying that those who seek spending control in an approach outside the item veto might seek ways of improving the rescission process so that it accomplishes the objectives that they have in mind without imbalancing the relationship between the legislative and executive branches.

What I have in mind particularly was something that happened earlier this year, but not this year alone, when the period of time set aside for rescission—the 45 days of continuous session—expired without any congressional action whatsoever. The Appropriations Committees turned to the affected executive agencies and told them, despite the law, don't spend the money, because we will rescind the funds sooner or later. If we rely on the rescission process, it is important for that process to work, by which I mean that Congress have an opportunity for the majority to decide with respect to whether the funds should be released or rescinded.

If that remedy is secured, then I would much prefer the rescission route than the item-veto route.

Senator FORD. Doctor, would you put that in written form, that last statement, and submit it, if nothing else, to me or for the——

The CHAIRMAN. I think no, if he would be kind enough to give it for the record—it's a valuable addition.

Dr. FISHER. The rescission process would allow you to get to individual projects which cannot be reached here through S. 43. Those projects, as we know, are all in the nonstatutory sources—sometimes committee reports, sometimes agency documents.

For people who are concerned about "pork" and "logrolling" and so forth, those details are not in appropriations bills, and that is an interesting difference with the State level; State appropriations bills are highly itemized.

The CHAIRMAN. Gentlemen, we thank you very kindly. Dr. Fisher, I hope you will remind Members of Congress of their constitutional duty to decide questions of constitutionality.

Dr. FISHER. I've already done that. In about a month, in the North Carolina Law Review, there will be my article on that subject.

The CHAIRMAN. Make sure I get a copy, and we will put it in the record.

Without objection, a statement from the senior Senator from South Carolina will be included in the record. Without objection, the statement from the National Association of Conservation Districts will be included in the record:

The CHAIRMAN. The committee will stand in recess subject to the call of the Chair.

[The committee adjourned at 12:38 p.m.]

[The following material was received for the record:]

## STATEMENT BY SENATOR STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman, I want to commend you and the other members of the Senate Rules Committee for holding hearings on this important fiscal management legislation.

Mr. Chairman, for at least the last decade, the problem of deficit spending on the part of the Federal government and the concomitant problem of a compounding national debt have been the focal point of increasing concern, debate, and criticism. The increased awareness of the severity and persistent nature of these problems has spawned various suggestions as to how this situation could be corrected.

As you know, I an the principal sponsor of S.J. Res. 13, which proposes a constitutional amendment requiring a balanced budget and also limiting tax increases. Additionally, I am a cosponsor of S.J. Res 11, which proposes a constitutional amendment permitting the President to disapprove any item of appropriation in any Act or Joint Resolution, as well as S. 43 which would accomplish this same goal by requiring each item of an appropriation to be enrolled as a separate measure for presentment to the President.

Mr. Chairman, over the years, as the size and areas of involvement of the Federal government have increased, the power and ability of the President to control spending has diminished. Not only has the scope of appropriation bills dramatically increased; but, with increasing regularity, Congress has resorted to adoption of Continuing Resolutions making appropriations for a wide array of programs in one measure, rather than through the passage of the 13 regular appropriation bills.

As a result, the President is put in the position of vetoing the bulk of Federal expenditures or accepting objectionable provisions. In addition, it has become common practice for appropriations to be made so near the expiration of existing spending authority that a Presidential veto, if sustained, would result in a disruption of vital government services because of the time required for a new appropriation measure, acceptable to the President and Congress, to be enacted.

While I do not advocate that Congress abandon its primary responsibility for determining the appropriate levels of expenditures in the various areas and programs, I do believe it would be wise to restore to the President much of the authority denied him as a result of the manner in which appropriations are now made. S. 43 would accomplish this by requiring that the separate sections and paragraphs of an appropriation bill or resolution be enrolled as separate pieces of legislation prior to being transmitted to the President. This requirement would expire after two years, and would not likely be reimposed unless it proves to be desirable.

Mr. Chairman, the Governors of 43 States have line item veto authority available to them in some form. Recent data shows that governors have used this budgetary device with great success. In 1983, vetoes achieved savings of $174.7 million in Illinois, $1.2 billion in California and $1.15 billion in Pennsylvania. When I was Governor of South Carolina, line item veto authority proved to be a most useful fiscal tool, enabling me to veto items that should not be in an appropriation bill.

Mr. Chairman, I thank you for allowing me to testify today on this most important matter. I think it would be helpful for the President to have this power, and I believe it would significantly reduce spending. I urge you and the other members of the Senate Rules Committee to favorably report S. 43 as soom as possible.

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National Association of Conservation Districts,
*Washington, DC, May 9, 1985.*

Hon. Charles McC. Mathias, Jr,
*Chairman, Senate Committee on Rules and Administration, Russell Senate Office Building, Washington, DC.*

Dear Senator Mathias: It has come to my attention that your committee has scheduled a hearing for May 14 to receive testimony on S. 43, the line item veto bill. In your letter dated March 29, 1985 you offered our organization a chance to comment on this legislation. This letter is to transmit our views.

NACD is a national organization chartered to keep the almost 3,000 conservation districts in the United States and its territories informed on federal issues of interest to them. Our organization is also the focal point for Congress and the Executive branch to contact in seeking the views of our member districts.

The NACD Council, our policy setting body, adopted a resolution in February of this year opposing adoption of line item veto authority for the Presidency. Our members concerns are quite simple. We feel that this legislation would erode the constitutional authority of Congress to set policy for the country.

In our view, it is essential for Congress to retain their share of control on federal policy. Congressmen and Senators are more closely tied to constituents in their home states than are agency personnel. Policy developed by Congress is a combination of the concerns of the electorate in various locales, welded together at the national level. We fear that the line item veto would remove too many of these policy decisions from open participation of people at the grassroots level.

NACD is commited to retaining decision making at the local and state level whenever possible. The size of our contry has become an insulator between the Presidency and the electorate, except in the most general terms. It is, therefore, essential that Congress retain authority over specific issues and programs and that the Executive branch truly be charged to carry out the will of the people manifested in Congressional decisions.

Our organization would welcome the opportunity to appear before your committee. However, if time constraints do not permit this, we would ask that this letter be made a part of the official hearing record.

Thank you for your consideration.

Sincerely,

Steven R. Meyer,
*Executive Secretary.*

# CONSTITUTIONAL INTERPRETATION BY MEMBERS OF CONGRESS

LOUIS FISHER

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# CONSTITUTIONAL INTERPRETATION BY MEMBERS OF CONGRESS

LOUIS FISHER†

*In an article published in this Review in 1983, Judge Abner Mikva contended that Congress lacks the political incentive and the institutional capacity to perform a meaningful constitutional analysis of pending legislation. Mr. Fisher disagrees with that contention and attempts to refute it in this Article. He argues that Congress has ample resources to perform effective constitutional analysis. Congress not only has its own sizable staff to assist with such analysis, but it also can turn to outside experts and counsel for advice. Mr. Fisher examines historical and contemporary examples of constitutional debate conducted by Congress to demonstrate that Congress can analyze difficult constitutional questions effectively. Congress, in Mr. Fisher's view, is fulfilling the duty it shares with the judiciary and the chief executive to uphold the Constitution.*

In a recent article Judge Abner J. Mikva of the United States Court of Appeals for the District of Columbia Circuit examined Congress' duty and ability to consider constitutional questions.[1] He concluded that Congress has neither the institutional nor the political capacity to engage in effective constitutional interpretation. Although each member of Congress takes an oath to support and defend the Constitution, Mikva contended that legislative debate, for the most part, "does not explore the constitutional implications of pending legislation; and, at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts."[2]

Judge Mikva criticized Congress for "pass[ing] over the constitutional questions, leaving the hard decisions to the courts."[3] Constitutional issues, he said, become "subsidiary to the desire to crack down on crime or bring administrative agencies under control . . . ."[4] Because constitutional issues "often present the most difficult value conflicts in society," it is tempting for members to sidestep these issues and leave them to the courts, "the ultimate nay-sayers."[5] "Such behavior by Congress is both an abdication of its role as a constitutional guardian and an abnegation of its duty of responsible lawmaking."[6] Building on three case studies, he advised Congress to limit its role to screening the easy cases, rejecting patently unconstitutional legislation, providing a different viewpoint on the Constitution, and clarifying its motivation when legislating.[7]

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† Specialist, Congressional Research Service, The Library of Congress. B.S. 1956, College of William and Mary; Ph.D. 1967, New School for Social Research. The views expressed in this Article are those of the author and should not be interpreted as positions of the Congressional Research Service. The author wishes to express his appreciation for constructive critiques offered by John Agresto, Stanley I. Bach, Phillip J. Cooper, Michael Davidson, Neal Devins, Michael J. Glennon, Jeremy Rabkin, James W. Robinson, Morton Rosenberg, and Gregory A. Scott.

[1] Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587 (1983).

[2] *Id.* at 587.

[3] *Id.* at 609.

[4] *Id.*

[5] *Id.* at 610.

These passages leave Congress with a mixed message. On the one hand, it should not abdicate its responsibilities by leaving the tough constitutional issues to the courts. On the other hand, Judge Mikva contends that it is institutionally and politically incapable of considering the constitutional questions before them. What is a member of Congress to do? Should Congress decide only the "easy" constitutional issues while passing the remaining issues to the courts?

This Article pursues the issues that Judge Mikva so ably has raised. From his unique vantage point as a federal appellate judge and former congressman, he has identified extremely important questions about a legislator's duty to determine constitutional questions. Additional facts, placed in a broader context, are needed to understand the scope of Congress' responsibility and ability to interpret the Constitution.

Section I reviews the doctrine of "coordinate construction" to demonstrate that Congress, by the very nature of our political system, shares with the executive and the judiciary the duty of constitutional interpretation. Congress makes significant contributions by participating in that constitutional dialogue. Section II discusses the authority and competence of Congress to engage in constitutional interpretation. The oath of office, the finding of facts for constitutional law, the resolution of "political questions," and the congressional staff reforms of recent decades are some examples that reinforce both congressional authority and competence. Finally, section III reexamines the three case studies offered by Judge Mikva. Despite institutional and political limitations shared with the President and the courts, the Article concludes that Congress can perform an essential, broad, and ongoing role in shaping the meaning of the Constitution.

## I. Coordinate Construction

"Even from the earliest years of the Republic," Judge Mikva writes, "the Congressional Record casts little light on the great constitutional debates that have periodically divided the country."[8] The historical record, however, demonstrates that Congress deliberated for years on such constitutional issues as judicial review, the Bank of the United States, congressional investigative power, slavery, internal improvements, federalism, the war-making power, treaties and foreign relations, interstate commerce, the removal power, and the legislative veto long before those issues entered the courts.[9] Congressional debate was intense, informed, and diligent. Indeed, it had to be, given the paucity of direction at that time from the Supreme Court and the lower courts. This section discusses the concept of coordinate construction from different perspectives: the debates in 1789 on the President's removal power; the concept of coordinate construction as understood by Thomas Jefferson, Andrew Jackson, and Abraham Lincoln; and the judicial doctrines that present the Supreme Court as the "ultimate interpreter."

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[6] *Id.*

[7] *Id.* at 608.

[8] *Id.* at 609.

[9] *See* W. Andrews, Coordinate Magistrates: Constitutional Law By Congress and the President 1-20 (judicial review), 21-43 (Bank), 44-64 (slavery), 65-95 (interstate commerce), 109-30 (removal power), 131-44 (war powers) (1969). For early debate on internal improvements, see A Documentary History of American Economic Policy since 1789 53-84 (W. Letwin ed. 1961). *See also* J. Hart, The American Presidency in Action 78-111 (treaties and

### *A. "The Decision of 1789"*

The 1789 debate on the President's removal power occupies several hundred pages of the *Annals of Congress* and constitutes an exceptionally penetrating examination of the doctrine of implied powers. Although some members argued that the Senate had to be included with the President in the removal of executive officials, others believed that these officials could be removed only through the constitutional process of impeachment. A third camp concluded that since Congress creates an office, it may attach to that office any condition it deems appropriate for tenure and removal. A fourth school insisted that the power of removal belonged exclusively to the President as an incident of his executive power.[10]

Should Congress have submitted this constitutional question to the judiciary for resolution? Nine days before the House debate on the removal power James Madison defended a list of constitutional amendments known collectively as the Bill of Rights. He predicted that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive."[11] When it came to the question of the removal power, however, he refused to defer to the judiciary and rejected the advice of those who said that "it would be officious in this branch of the Legislature to expound the Constitution, so far as it relates to the division of power between the President and the Senate."[12] To Madison it was

> incontrovertibly of as much importance to this branch of the Government as to any other, that the Constitution should be preserved entire. It is our duty, so far as it depends upon us, to take care that the powers of the Constitution be preserved entire to every department of Government . . . .[13]

Madison continued:

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foreign relations), 152-248 (removal power) (1948); C. Miller, The Supreme Court and the Uses of History 52-70, 205-10 (removal power) (1969); D. Morgan, Congress and the Constitution 49-57 (removal power), 101-118 (investigative power), 140-59 (interstate commerce), 184-203 (legislative veto) (1966); A. Sofaer, War, Foreign Affairs and Constitutional Power (1976) (discussing constitutional deliberations by Congress from 1789 to 1829).

[10] *See* L. Fisher, Constitutional Conflicts Between Congress and the President 60-66 (1985).

[11] 1 Annals of Cong. 439 (J. Gales ed. 1789).

[12] *Id.* at 500.

[13] *Id.*

> But the great objection drawn from the source to which the last arguments would lead us is, that the Legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the Judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of Government, that the exposition of the laws and Constitution devolves upon the Judiciary. But I beg to know, upon what principles it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments? The Constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the Constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.[14]

In the leading case of *Myers v. United States*,[15] Chief Justice Taft turned to the congressional debate of 1789 to determine the scope of the President's removal power. Following the discussion in the House of Representatives day by day and vote by vote, he concluded that "there is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone . . . ."[16] He noted that Madison was "then a leader in the House, as he had been in the Convention. His arguments in support of the President's constitutional power of removal independently of Congressional provision, and without the consent of the Senate, were masterly, and he carried the House."[17]

Taft relied both on the legislative discussion and the decision of the First Congress, not because a congressional determination on a constitutional issue

> is conclusive, but, first, because of our agreement with the reasons upon which it is avowedly based; second, because this was the decision of the First Congress, on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification; and, third, because that Congress numbered among its leaders those who had been members of the Convention.[18]

Taft concluded that the power of removal "must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering."[19]

While Taft based his decision on the congressional debates of 1789, the dissenters in *Myers* looked to that same record and other congressional actions to support their conclusions. Justice McReynolds, reviewing an 1835 Senate debate, described the danger of placing unrestrained power in the Executive to remove officials.[20] He also pointed to the struggle for civil service reform, as a method of ensuring some security of official tenure, and to the many statutes enacted by Congress restricting the President's removal power.[21] His reading of the debates of 1789 did not produce the same impression of unrestrained executive power that Taft had discovered.[22]

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[14] *Id.*

[15] 272 U.S. 52 (1926) (Congress may not regulate President's removal of officers appointed with Senate confirmation.).

[16] *Id.* at 114.

[17] *Id.* at 115.

[18] *Id.* at 136.

[19] *Id.* at 161. For Justice Sutherland's reliance on a statement by Congressman John Marshall in 1800 and a Senate report in 1816 to define the President's foreign affairs powers, see United States v. Curtiss-Wright, 299 U.S. 304, 319 (1936).

Practices after 1789 also helped to reinforce "the right of Congress to impose restrictions."[23] Justice Brandeis' dissent itemized the numerous statutes that had allowed Congress to restrict the President's removal power. That record convinced him that a "persistent legislative practice which involves a delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction, in the absence of any decision by any court to the contrary."[24]

Taft's doctrinaire decision was undermined repeatedly by Congress' decision to place statutory limits on the President's power to remove administrative officials who exercised quasi-legislative and quasi-judicial powers. In time, the Supreme Court took account of these congressional actions and limited the scope of *Myers v. United States*.[25] The Court's orientation toward the removal power was shaped and reshaped by these congressional interpretations.

### *B. Thomas Jefferson*

Judge Mikva attributes part of the "mixed performance" of Congress "to the fact that its proper role in making constitutional judgments has never been firmly defined."[26] Thomas Jefferson, he notes, envisioned that each branch of government would act as an independent guardian of the Constitution and each would have "the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question."[27] Following this Jeffersonian model, Judge Mikva advises Congress not to "engage in the same kind of constitutional reasoning that is performed by the judiciary," because this approach "forces Congress to act as a lower federal court, reading and interpreting Supreme Court precedent."[28] Acting like a lower federal court, he says, "is certainly not what Jefferson envisioned for Congress; Congress should be able to make its own decisions rather than having to predict what the Supreme Court would do—a function that is presumably already being performed by the judicial system."[29]

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[20] *Id.* at 179-81 (McReynolds, J., dissenting).

[21] *Id.* at 181 (McReynolds, J., dissenting).

[22] *Id.* at 193-99 (McReynolds, J., dissenting).

[23] *Id.* at 202 (McReynolds, J., dissenting).

[24] *Id.* at 283 (Brandeis, J., dissenting) (citing United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915)).

[25] *See* Wiener v. United States, 357 U.S. 349 (1958) (President lacked authority to remove a member of an adjudicatory commission); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (Congress may restrict President's power to remove officers performing quasi-judicial and quasi-legislative duties).

[26] Mikva, *supra* note 1, at 587.

[27] *Id.* at 587-88 (citing 1 THE JEFFERSON ENCYCLOPEDIA 190 (J. Foley ed. 1900)).

[28] *Id.* at 607.

Although Congress should be able to make its own decisions rather than merely anticipate Supreme Court decisions, Jefferson's solution was much more radical. He made his own decisions on constitutional issues even *after* the other branches had announced their positions. Believing the Alien and Sedition Acts to be unconstitutional, Jefferson and his followers were appalled when the federal courts failed to strike them down.[30] Once in office as President, Jefferson "discharged every person under punishment or prosecution under the sedition law."[31] He believed

> that law to be a nullity, as absolute and as palpable as if Congress had ordered [the people] to fall down and worship a golden image; and that it was as much [his] duty to arrest its execution in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image.[32]

Thus, Jefferson did more than envision the three branches as "co-ordinate and independent of each other."[33] Acts by one branch were not to control later considerations by another branch.[34] Writing to Judge Spencer Roane, Jefferson stated that each branch was "truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal."[35] Jefferson's theory could produce as many meanings of the Constitution as there are branches of government, and possibly more, given the freedom of each new Congress and each new President to discard interpretations of their predecessors. The country would face a plethora of conflicting, shifting interpretations, all of equal weight. Under this theory, for example, President Nixon might have been at liberty to insist that his view of executive privilege had the same merit and authority as that of the Supreme Court.[36]

### C. *Andrew Jackson*

Andrew Jackson's view of coordinate construction was less threatening to the rule of law. Although Jackson inherited the Jeffersonian criticism of the judiciary, he realized that the federal courts were an important source of political authority for turning back the nullification doctrine. He realized that it might be necessary to form an alliance between the presidency and the judiciary to keep the nation intact.[37]

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[29] *Id.*

[30] *See* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 215 (1937).

[31] 11 THE WRITINGS OF THOMAS JEFFERSON 43 (Bergh ed. 1904) (letter to Mrs. John Adams, July 22, 1804).

[32] *Id.* at 43-44.

[33] *Id.* at 213 (letter to George Hay, June 2, 1807).

[34] *Id.* at 213-14. For further insight into Jefferson's position on the nullity of the Alien and Sedition Act, see 12 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 31, at 288-90 (letter to Wilson C. Nicholas, June 13, 1809); 14 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 31, at 116 (letter to Gideon Granger, Mar. 9, 1814); 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 31, at 214 (letter to Judge Spencer Roane, Sept. 6, 1819).

[35] 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 31, at 214 (letter to Judge Spencer Roane, Sept. 6, 1819).

[36] *See* J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 83 (1984). *But see* United States v. Nixon, 418 U.S. 683 (1974) (separation of powers doctrine cannot justify an absolute unqualified Presidential privilege of immunity from judicial process in all circumstances).

Jackson's theory of coordinate construction was announced in his message vetoing the bill that would have rechartered the Bank of the United States in 1832. Although the Supreme Court had upheld the constitutionality of the Bank,[38] and advocates of the Bank maintained that "its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court," Jackson did not agree with this view.[39] He concluded that "mere precedent" should not be decisive in questions of constitutional power "except where the acquiescence of the people and the States can be considered as well settled."[40] The legislative record on the Bank, he pointed out, was full of contradictions. Congress favored the Bank in 1791, but voted against it in 1811. Congress again rejected the Bank in 1815, but supported it a year later. Moreover, sentiment from the states was generally hostile to the Bank.[41]

> If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judical decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.[42]

Jackson's theory of coordinate construction therefore embodied a number of constraints not found in Jefferson's model. Judicial precedents could govern other governmental bodies' actions only if those bodies acquiesced to them. The authority of the Supreme Court could not control Congress or the Executive

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[37] Longaker, *Andrew Jackson and the Judiciary*, 71 Pol. Sci. Q. 341 (1956). Despite Jackson's well-known animosity for some members of the judiciary, particularly Chief Justice John Marshall, and political conflict between Jackson and the courts, Jackson was a firm believer in the importance of a vigorous and powerful court system and the principles of judicial review. *Id.* at 364.

[38] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315 (1819).

[39] 3 A Compilation of Messages and Papers of the Presidents 1144 (J. Richardson ed. 1897).

[40] *Id.* at 1145.

[41] *Id.*

[42] *Id.*

"when acting in their legislative capacities," and the influence of the Court in such instances would depend on "the force of their reasoning." Jackson believed that each public officer should support the Constitution "as he understands it, and not as it is understood by others." He did not embrace, however, the Jeffersonians' unyielding hostility toward the courts. Rather, he viewed the courts as potential allies in building a stable political order.

### *D. Abraham Lincoln*

Abraham Lincoln's July 17, 1858 speech at Springfield, Illinois also is compatible with democratic principles and the rule of law. Stephen Douglas, Lincoln's opponent in the 1858 Senate race, had announced his support of the year-old Supreme Court decision in *Dred Scott v. Sandford*.[43] Lincoln limited his support of that decision by saying that "in so far as it decided in favor of Dred Scott's master and against Dred Scott and his family, I do not propose to disturb or resist the decision."[44] Lincoln, however, did not agree with Douglas' wholehearted endorsement, which Lincoln characterized as having "the citizen conform his vote to that decision; the Member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the government."[45] By resisting the decision "as a political rule," he said he would "disturb no right of property, create no disorder, excite no mobs."[46]

What Lincoln challenged was the inference in *Dred Scott* that the nation should remain divided between those free and those enslaved. He opposed the spread of slavery to the new territories, rejecting the Court's decison as a basis for nationalizing Negro slavery. His philosophy of government looked not to Chief Justice Taney's opinion in *Dred Scott* but to the principles incorporated in the Declaration of Independence. He asked Douglas and his adherents if they wanted to amend the Declaration to read that "all men are created equal except negroes."[47]

> My declarations upon this subject of negro slavery may be misrepresented, but can not be misunderstood. I have said that I do not understand the Declaration to mean that all men were created equal in all respects. They are not our equal in color; but I suppose that it does mean to declare that all men are equal in some respects; they are equal in their right to "life, liberty, and the pursuit of happiness." Certainly the negro is not our equal in color—perhaps not in many other respects; still, in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black. In pointing out that more has been given you, you can not be justified in taking away the little which has been given him. All I ask for the

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[43] 60 U.S. (19 How.) 393 (1857).

[44] 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 516 (R. Basler ed. 1953) (speech at Springfield, Ill., July 17, 1858).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 520.

> negro is that if you do not like him, let him alone. If God gave him but little, that little let him enjoy.[48]

Lincoln refused to defer to *Dred Scott* and to allow it to set the moral tone and political direction of the United States. At stake was not an abstract or technical question of law but rather the future of the country. Every citizen had a duty to express opinions and help shape the contours of constitutional structures and rights. "Like politics, with which it was inextricably joined, the Constitution was everybody's business."[49] To Lincoln, the Supreme Court was a coequal, not superior, branch of government. The Court existed as one branch of a political system, subject to a combination of checks and balances, including the force of public opinion. Thus, in his inaugural address in 1861, he denied that constitutional questions could be settled solely by the Supreme Court. If government policy on "vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers . . . ."[50] Congress and the President were free to reach their own constitutional judgments, even if at odds with past Court rulings, and then let the Court decide again.

### *E. Judicial Doctrines*

Beginning with Chief Justice Marshall's declaration in *Marbury v. Madison* that "[it] is emphatically the province and duty of the judicial department to say what the law is,"[51] the Supreme Court has insisted that it alone delivers the "final word" on the meaning of the Constitution. *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . ."[52] The Court reasserted this principle in 1962:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[53]

Being "ultimate interpreter," however, is not the same as being exclusive interpreter. The courts expect other branches of government to interpret the Constitution in their initial deliberations. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[54] Congressional interpretations are given substantial weight in some circumstances, even to the point of becoming the controlling factor.[55]

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[48] *Id.*

[49] H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 6 (1975).

[50] 7 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 39, at 3210.

[51] 5 U.S. (1 Cranch) 137, 177 (1803).

[52] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[53] Baker v. Carr, 369 U.S. 186, 211 (1962). The notion that the Supreme Court is the "ultimate interpreter" was repeated in Powell v. McCormack, 395 U.S. 486, 549 (1969).

[54] United States v. Nixon, 418 U.S. 683, 703 (1974).

Congressional and executive practices over a number of years can be instrumental in fixing the meaning of the Constitution.[56] The Supreme Court, upholding the President's removal power in a 1903 decision, based its ruling largely on the "universal practice of the government for over a century."[57] Presidential action in which Congress has acquiesced can become a justification for the exercise of power.[58] Courts also will defer to agency interpretations if they consistently are construed and made a repeated matter of public record.[59] The weight of these customs has transformed the Constitution over time.[60]

Moreover, being the "ultimate interpreter" does not grant the judiciary superiority in the sense that final judgments are unreviewable. Eight years before writing *Dred Scott*, Chief Justice Taney wrote a dissenting opinion in which he noted that the Court's opinion "upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."[61] Referring to Taney's dissent, Justice Frankfurter spoke about the need for "judicial exegesis" in interpreting broadly phrased charters like the Constitution. To Frankfurter, "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[62]

These comments by Jefferson, Jackson, Lincoln, Taney, and Frankfurter demonstrate that the Supreme Court is the "ultimate interpreter" only when its decisions have been accepted as reasonable and persuasive by the people and other governmental units. This test does not require deference to the judiciary because of its purported technical ability and political isolation. Each decision is subject to scrutiny and rejection by private citizens and public officials. If courts indeed did have the last word, we could not justify our efforts in law reviews and other forums to evaluate recent decisions and doctrines.

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[55] *See* Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (In the context of a challenge to male-only registration for military service, the Court noted: "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the Act's constitutionality.").

[56] *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (Dismissing a challenge that the Judiciary Act of 1789 was unconstitutional, the Court stated that "practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and had indeed fixed the construction. It is a contemporary interpretation of the most forcible nature.").

[57] Shurtleff v. United States, 189 U.S. 311, 316 (1903).

[58] *See* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) (Presidential decisions over a period of years "clearly indicate that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands.").

[59] *See* Udall v. Tallman, 380 U.S. 1 (1965) (when an executive officer's interpretation is not unreasonable and has been made a repeated matter of public record, courts must respect it).

[60] For an effective critique of court doctrines on custom and acquiescence, see Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109 (1984).

[61] The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

[62] Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491-92 (1939).

What is "final" at one stage of our political development may be reopened at some later date, leading to fresh interpretation and overruling of past judicial doctrines. Courts are the ultimate interpreter of a particular case, but not of the larger issue of which that case is a part. Disagreement with a particular decision can lead to new litigation testing the same issue. Although Judge Mikva stated that the constitutional system "was designed to give the courts the final say,"[63] he also described the Constitution as "a living document that evolves over time; pressure on the Court from Congress to reevaluate the meaning of the Constitution is not always detrimental."[64] Courts are at liberty to review prior holdings and reverse or distinguish cases that seem wrongly decided. The Court is especially prone to abandon the doctrine of stare decisis when the Court discovers errors of constitutional doctrine.[65] Executives, legislators, and the general public also should be free to participate in periodic reexaminations; the process of reconsideration should not be the exclusive province of judges.

## II. AUTHORITY AND COMPETENCE

Although acknowledging that "there is a role for Congress to play in making constitutional judgments," Judge Mikva noted that the "ability of Congress to do so is less certain."[66] He concluded that both institutionally and politically, Congress "is designed to pass over the constitutional questions, leaving the hard decisions to the courts."[67]

> [B]oth [H]ouses are large, making the process of engaging in complex arguments during a floor debate difficult. For the most part, the speeches made on the floor are designed to get a member's position on the record rather than to initiate a dialogue. Because of the volume of legislation, the time spent with constituents, and the technical knowledge required to understand the background of every piece of legislation, it is infrequent that a member considers the individual merits of a particular bill. Often a vote is determined by a thumbs up-or-down sign by the party leader, or by a political debt that needs to be repaid. While it is true . . . that a majority of the members of Congress are lawyers, they have not kept up-to-date on recent legal developments. In fact, most Supreme Court opinions never come to the attention of Congress. Unlike judges, the Representatives and Senators are almost totally dependent on the recommendations of others in making constitutional judgments.[68]

Judge Mikva further noted that Congress is a "reactive body" unable to pass legislation until problems reach "crisis proportions"; under such pressure to enact a bill, Congress "is not primarily concerned with the law's details."[69]

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[63] Mikva, *supra* note 1, at 610-11.

[64] *Id.* at 608.

[65] *See* Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

[66] Mikva, *supra* note 1, at 609.

[67] *Id.*

[68] *Id.*

[69] *Id.*

Moreover, constitutional interests affected by a bill "are generally abstract, unpopular, and fail to capture the imagination of either the media or the public."[70] Judge Mikva finds constitutional debate by members of Congress "superficial and, for the most part, self-serving."[71] The "most likely place for constitutional dialogue is in the committees."[72] Even with the advantages of committee size and format, however, "the urgency of the issues, the reliance of members on others for guidance, and the complexity of the problems presented often prevent meaningful congressional constitutional analysis."[73]

Congress certainly suffers from these and other problems. Even when members debate a constitutional issue it may be for purely tactical reasons—such as trying to deep-six a bill—rather than for genuine and sincere concerns about protecting the Constitution. For all its structural weaknesses, however, Congress can find virtues among its vices. Constitutional law often turns on factfinding and the balancing of conflicting values. Members of Congress can make important contributions in both areas. Reforms of recent decades also have increased the capability of members to participate in constitutional debate and to honor their commitment to support the Constitution.

### A. *Oath of Office*

Members of Congress are constitutionally required to take an oath "to support th[e] [C]onstitution."[74] As specified by statute, members

> solemnly swear . . . [to] support and defend the Constitution of the United States against all enemies, foreign and domestic; . . . [to] bear true faith and allegiance to the same; . . . [to] take this obligation freely, without any mental reservation or purpose of evasion; and . . . [to] well and faithfully discharge the duties [of their office].[75]

The assertion in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[76] does not relieve members of Congress of the duty to debate constitutional questions at the time a bill is under consideration. The duty and oath to support and defend the Constitution are not cancelled by claims of institutional incompetence or personal uncertainty. Members swear or affirm to defend the Constitution "without any mental reservation or purpose of evasion."[77] As Paul Brest has written: "Many legislators are not lawyers; the legislative process is not structured to allow constitutional questions to be examined systematically or dispassionately; and many constitutional problems arise only as legislation is implemented. Although these points may argue for judicial review, they do not argue against an initial legislative examination."[78]

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[70] *Id.* at 609-10.

[71] *Id.* 610.

[72] *Id.*

[73] *Id.*

[74] U.S. CONST. art. VI, cl. 3.

[75] 5 U.S.C. § 3331 (1982).

[76] 5 U.S. (1 Cranch) 137, 177 (1803).

[77] 5 U.S.C. § 3331 (1982).

Some provisions of the Constitution are addressed explicitly to members of Congress and cannot be evaded by the anticipation of judicial review. The Constitution mandates, for example, that "No Bill of Attainder or ex post facto law *shall be passed*."[79] Accordingly, members should make a constitutional determination on this issue prior to, not after, a bill's passage. Similarly, the first amendment commands that "Congress *shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[80] It would be unseemly for members to legislate blindly, expecting the judiciary to correct the constitutional problem at some future date.[81] Furthermore, members of Congress must scrutinize a bill for constitutional defects because it is the practice of courts not to pass on the constitutionality of a statute if it can be construed solely on statutory grounds.[82] As Justice Brandeis noted in 1936, the Court has developed a series of rules "under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[83] When the validity of a congressional statute is questioned, "and even if a serious doubt of constitutionality is raised," the Court first will determine whether the statute can be construed to avoid the constitutional question.[84] "It is well settled that if a case may be decided on either statutory or constitutional grounds, [the] Court, for sound jurisprudential reasons, will inquire first into the statutory question."[85]

Legislative precedents in the House of Representatives do not permit the Speaker or the Chair to rule on questions of constitutionality. Points of order raising the issue of unconstitutional provisions are referred to the House for resolution.[86] Under Senate practices whenever a member raises a question of constitutionality the Chair submits the question to the Senate for decision.[87] A fascinating example of this custom occurred in 1984 after Senator Mack Mattingly offered an amendment to give the President item-veto authority over appropriations bills. He proposed an override vote of a majority of each chamber rather than the two-thirds required by the Constitution.[88] After Senator Lawton Chiles expressed concern about "rewriting the Constitution" by statute,[89] Senator Alan Dixon admitted that "as a lawyer, I have some difficulty about the constitutional viability of this approach."[90] Dixon nevertheless attempted to dispose of the constitutional issue by stating that "it is for the courts, not the Senate. Nobody knows, because the courts have never ruled . . . . It comes down, then, to the question of whether this is a good idea."[91]

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[78] Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 588 (1975).

[79] U.S. CONST. art. I, § 9, cl. 3 (emphasis added).

[80] U.S. CONST. amend. I (emphasis added).

[81] Brest, *supra* note 78, at 587.

[82] *See* United States v. Clark, 445 U.S. 23, 27 (1980).

[83] Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

[84] *Id.* at 348 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

[85] Harris v. McRae, 448 U.S. 297, 306-07 (1980).

[86] 2 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 1255, 1318-1320, 1322, 1490-1491 (1907) [hereinafter cited as A. HINDS' PRECEDENTS]; 4 A. HINDS' PRECEDENTS, *supra*, at § 3507; *see* 8 C. CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 2225, 3031, 3071, 3427 (1936) [hereinafter cited as C. CANNON'S PRECEDENTS]; 94 CONG. REC. 5817 (1948); 93 CONG. REC. 9522-23 (1947).

[87] SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 2, 97th Cong., 1st Sess. 538-39 (1981).

Senator Pete Domenici, however, regarded the amendment as unconstitutional; he disagreed "that something as patently unconstitutional as this ought to be passed" and then transferred to the courts for resolution.[92] Senator John Stennis also opposed the amendment, stating that it failed to touch the "top, side, or botton [sic] of the real Constitution that we have and live under;"[93] Senate Majority Leader Howard Baker concluded that the amendment attempted "to deal with a constitutional issue in a statutory form."[94]

Senator Chiles then raised a point of order "that the bill is legislation which changes the Constitution of the United States."[95] Following Senate precedents, the Chair submitted the question to the Senate. Before the question could be debated, however, Senator Mattingly moved to table the point of order. That tactic failed by the vote of forty-five to forty-six.[96] During debate on the point of order, Senator Baker said that just as the Supreme Court could review and pass on the enactments of Congress, "it is equally true, and the precedent is just as old, that the Senate of the United States must first exercise its own judgment as to whether a matter before it conforms with or violates the Constitution."[97] With regard to prior statements that courts had not yet ruled on the statutory grant of item-veto power to the President, Chiles remarked that the question "is so clear that no court, from a justice of the peace on, has ever had to rule on it."[98] Dixon responded that the law "is unsettled" and that the "only question is whether we have the courage to let the Supreme Court of the United States decide. This Senate is not the place where 100 separate Senators make that kind of judicial decision . . . ."[99] He admitted that as a lawyer he had "doubts and reservations about whether [the Congress could] do it. But I want to do something to reduce our budget deficits."[100]

Senator Slade Gorton found the arguments in favor of the amendment

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[88] 130 CONG. REC. S5297 (daily ed. May 3, 1984).

[89] *Id.* at S5304.

[90] *Id.* at S5305.

[91] *Id.* Senator Mattingly also noted that he was "willing to let the constitutional questions be decided in their proper judicial forums." *Id.* at S5307.

[92] *Id.* at S5310.

[93] *Id.* at S5311.

[94] *Id.* at S5312.

[95] *Id.*

[96] *Id.*

[97] *Id.* at S5313.

[98] *Id.*

[99] *Id.*

[100] *Id.* at S5314.

"profoundly disturbing" because none of the proponents seemed to believe that the proposal was constitutional. He chided Senators Dixon and Mattingly, stating:

> [Y]ou swore an oath, as I did, when you became Members of this body to uphold the Constitution of the United States. You cannot hide behind the fact that the Supreme Court of the United States has final authority on constitutional questions. You cannot hide behind that proposition to ignore your own duty properly to interpret the Constitution, which you have inherited after 200 years of history. It is your duty to make a judgment as to whether or not this amendment is constitutional.
>
> If you can in good faith say you believe that it is, you can vote in the way which the Senator from Illinois has made a claim. But to duck your responsibility on the ground that sometime, at some future date, the Supreme Court will have final authority over the question is to ignore the oath which you swore when you became a Member of this body.[101]

Senator Paul Sarbanes, siding with Gorton and Chiles, agreed that there had been no prior litigation on the proposal because it was "patently unconstitutional."[102] He offered this analogy:

> Suppose someone submitted a legislative proposal to change the term of the President to [two] years, or the Senate to four, or the House to three. Suppose I put in that legislative proposal; then say, well, the Supreme Court has never ruled on this question. . . . What happens to our own responsibility to make a judgment to uphold the Constitution, and make a judgment with respect to whether a proposition before us has any slim claim to constitutional validity?[103]

The Senate rejected the Mattingly Amendment, voting fifty-six to thirty-four in favor of Chiles' point of order.[104] It is impossible to determine which Senators debated the constitutional issue because it was the simplest way to defeat an amendment they opposed on policy grounds. Clearly a constitutional issue was present, particularly the balance of power between the executive and legislative branches, and it is important to note that Senate rules allow a member to make a point of order solely on constitutional grounds. It also is significant that some of the Senators viewed their oath of office as a requirement that they determine the constitutionality of pending bills and amendments instead of deferring those questions to the courts for disposition.

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[101] *Id.*

[102] *Id.*

[103] *Id.* at S5314-15. Senator Dale Bumpers supported Sarbanes' thesis with the following comments:

> Each one of us held up our hand, took the oath of office, and said we will uphold the Constitution of the United States.
>
> There was no caveat. You did not say, "I will uphold the Constitution of the United States only on those cases where precedent is well established." You did not say, "I will uphold the Constitution unless something is presented to the Senate that the Court has never ruled on, in which case I will vote for it so the Supreme Court can rule."

*Id.* at S5315.

[104] *Id.* at S5323.

### *B. Legislative Facts in Constitutional Law*

The Supreme Court recognizes that much of constitutional law depends on factfinding, which is a particular strength of Congress. After decades of applying substantive due process to economic regulation, which allowed the courts to strike down efforts by Congress and state legislatures to regulate such economic areas as minimum wages, maximum hours, prices, and working conditions, the Supreme Court decided that it no longer would sit as a superlegislature.[105] Since 1937 the Court has been content to leave the broad area of economic rights and government regulation to congressional judgment. Unless the actions of Congress and its delegated agents can be shown clearly to be arbitrary or beyond the limits of due process, judicial inquiry "is at an end."[106] When the judiciary determines that legislators have chosen a "rational basis" for carrying out the commerce power, for example, the Court's investigation ceases.[107]

In 1966 the Court adopted a broad interpretation of the power of Congress "to enforce, by appropriate legislation," the provisions of the fourteenth amendment. At issue in *Katzenbach v. Morgan*[108] was the power of Congress to prohibit New York's literacy requirement as a precondition for voting. Section 4(e) of the Voting Rights Act of 1965[109] provided that no person who had completed the sixth grade in Puerto Rico could be denied the right to vote in any election because of an inability to read or write in English. Although important constitutional issues of federalism were at stake, the Court concluded that section 4(e) was "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment . . . ."[110] Factfinding was a legislative, not a judicial, responsibility.

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional

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[105] Olsen v. Nebraska, 313 U.S. 236, 246 (1941) ("We are not concerned, however, with the wisdom, need, or appropriateness of the legislation."); *see also* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (same; quoting *Olsen*, 313 U.S. at 246).

[106] FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942).

[107] *See* Hodel v. Indiana, 452 U.S. 314, 323-24 (1981); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964). For a discussion of the capacity of courts to engage in factfinding, see Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

[108] 384 U.S. 641 (1966).

[109] Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973b(e) (1982)).

[110] *Morgan*, 384 U.S. at 646.

> resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.[111]

Even Justice Harlan acknowledged in his dissent that section five of the fourteenth amendment "does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action . . . ."[112] Decisions on equal protection and due process, he said, "are based not on abstract logic, but on empirical foundations. To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect."[113] Harlan nevertheless dissented because he believed that the question was whether the New York law was "so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine."[114] The majority opinion, however, held that a construction of section five that "would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."[115] The issue was not simply a factual determination by Congress that was better resolved by the legislature than the judiciary. It also was a factual dispute between the national legislature and a state legislature. To Harlan, the majority read section five "as giving Congress the power to define the *substantive* scope of the Amendment."[116]

*Katzenbach v. Morgan* spawned a burgeoning literature on the power of Congress to invoke section five of the fourteenth amendment. One commentator claimed that the *Morgan* Court suggested that "to some extent at least, § 5 exempts the Fourteenth Amendment from the principle of Court-Congress relationships expressed by *Marbury v. Madison*, that the judiciary is the final arbiter of the meaning of the Constitution."[117] This assertion goes too far. Although the Court treats congressional determinations under section five with respect and a substantial degree of deference, it still must "perceive a basis upon which the Congress might resolve the conflict as it did."[118] The *Morgan* Court also noted that congressional power under section five

> is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing

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[111] *Id.* at 653.

[112] *Id.* at 666 (Harlan, J., dissenting).

[113] *Id.* at 668 (Harlan, J., dissenting).

[114] *Id.* at 667 (Harlan, J., dissenting).

[115] *Id.* at 648.

[116] *Id.* at 668 (Harlan, J., dissenting); *see* Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV. 656 (1977); Note, *Congressional Power to Enforce Due Process Rights*, 80 COLUM. L. REV. 1265 (1980).

[117] Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 84.

[118] *Morgan*, 384 U.S. at 653.

> the States to establish racially segregated systems of education would not be—as required by § 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.[119]

As an example of judicial line-drawing, in 1970 the Court ruled that section five did not empower Congress to lower the voting age to eighteen in state elections.[120] Congress responded by passing the twenty-sixth amendment.

A contemporary dispute concerns the effort of some members of Congress to use section five to alter the jurisdiction of federal courts to deal with abortion. Hearings in 1981 explored the use of section five as a vehicle for overturning the Supreme Court's 1973 *Roe v. Wade* abortion decision.[121] Advocates of the "Human Life Bill" proposed that the word "person" in the fourteenth amendment be defined to include life beginning at conception. They argued that Congress would be exercising a judgment over "facts," not "law."[122] The *Roe* Court, however, based its decision not on a factual or philosophical determination of when life begins, but rather on a legal interpretation of the meaning of "person" under the fourteenth amendment. The Court decided that a fetus was not a person in a constitutional sense.[123] It therefore announced a constitutional, not a legislative, finding.

Although congressional use of section five is subject to limitations and remains a topic of controversy, the application of the equal protection clause or the due process clause in the fourteenth amendment depends heavily on congressional factfinding and judgments. The problems of application "quite genuinely involve investigation and evaluation of facts. These are areas in which Congress has at least some claims to superior competence while the Court has none."[124]

Similarly, the fifteenth amendment, which prohibits states from restricting voting on account of race, color, or previous condition of servitude, grants Congress the power to enforce its provisions by appropriate legislation.[125] The Supreme Court has deferred to congressional interpretations so long as Congress uses "any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[126] Congress is "chiefly responsible" for implementing the rights created in the fifteenth amendment.[127]

Just as Judge Mikva can raise questions about the capacity of Congress to engage in effective constitutional interpretation, in part because of institutional deficiencies, judicial activism has been challenged on the ground that federal judges lack both the authority and the capacity to decide questions of broad social policy. Donald Horowitz has identified some of the characteristics of adjudication that limit the reliability of judicial decisions. Among those limitations is the difficulty of determining social facts through the judicial factfinding process.[128] The issue, therefore, is not simply one of measuring the competence of Congress against an ideal standard, but of comparing legislative to judicial competence. Because both branches have their strengths and their weaknesses, an open dialogue between Congress and the courts is a more fruitful avenue for constitutional interpretation than simply believing that the judiciary possesses certain superior skills. If we count the times that Congress has been "wrong" about the Constitution and compare those lapses with the occasions on which the Supreme Court has been "wrong" by its own later admissions, the results make a compelling case for legislative confidence and judicial modesty.

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[119] *Id.* at 651-52 n.10; *see also* Fullilove v. Klutznick, 448 U.S. 448 (1980) (judicial deference to congressional interpretations of § 5 of fourteenth amendment).

[120] Oregon v. Mitchell, 400 U.S. 112 (1970).

[121] 410 U.S. 113 (1973).

[122] 1 *The Human Life Bill: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 197-233 (1981) (testimony and article by Stephen H. Galebach).

[123] *Roe*, 410 U.S. at 157-58.

[124] Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 255 (1971).

[125] U.S. CONST. amend. XV, § 2.

[126] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[127] *Id.* at 326; *see also* City of Rome v. United States, 446 U.S. 156, 177 (1980) ("It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate' . . . .").

### *C. Political Questions*

Members of Congress must deal with a number of constitutional issues that are never decided by the courts because of such threshold issues as standing, jurisdiction, and "political questions." Courts have stated their reluctance to decide an issue when there has been "a textually demonstrable constitutional commitment . . . to a coordinate political department."[129] Although this "territory" of political questions varies over time and gives ground on occasion to permit greater judicial involvement,[130] the scope of congressional and presidential responsibility for constitutional interpretation remains substantial.

The Constitution empowers Congress

> [t]o provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[131]

When this clause was interpreted in the Kent State University decision, the Supreme Court regarded the supervision of the National Guard as a matter vested solely in Congress. The Court noted that "it is difficult to conceive of an area of governmental activity in which the courts have less competence."[132]

Courts also defer to Congress in cases that lack "judicially discoverable and manageable standards for resolving" a dispute.[133] Is thirteen years too long a time to allow states to ratify a constitutional amendment? The Supreme Court decided that it lacked statutory and constitutional criteria for a judicial determination of this issue. The question of a reasonable time involved "an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice . . . ."[134]

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[128] D. HOROWITZ, THE COURTS AND SOCIAL POLICY 45-51 (1977); *see also* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing nature of adjudicatory processes).

[129] Baker v. Carr, 369 U.S. 186, 217 (1962).

[130] *See, e.g.*, Roudebush v. Hartke, 405 U.S. 15 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Baker v. Carr, 369 U.S. 186 (1962).

[131] U.S. CONST. art. I, § 8, cl. 16.

[132] Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[133] Baker v. Carr, 369 U.S. 186, 217 (1962).

Courts are loath to adjudicate when it is impossible to decide a controversy "without an initial policy determination of a kind clearly for nonjudicial discretion."[135] Did President Reagan violate the War Powers Resolution by sending military advisers to El Salvador? The factfinding necessary to resolve this dispute rendered the case nonjusticiable because that question was "appropriate for congressional, not judicial, investigation and determination."[136]

Other constitutional questions are denied judicial resolution because the plaintiffs are unable to establish standing. The Constitution provides an explicit safeguard for financial accountability: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[137] The failure of Congress to publish the expenditures of the Central Intelligence Agency prompted a lawsuit by William Richardson, but a series of rulings from 1969 to 1974 ended with the Supreme Court's decison that Richardson lacked standing to maintain his suit.[138] The interpretation of the statement and account clause therefore is left to Congress. Thus far, Congress has concluded that publication of the expenditures of the intelligence community, even in aggregate, poses too much risk to national security.[139]

Standing also has barred adjudication of the incompatibility clause, which states that no officer of the United States "shall be a Member of either House during his Continuance in Office."[140] Efforts to litigate this clause have been turned back by the courts on the ground of standing.[141] Instead, the boundaries of this clause of the Constitution have been defined by various House and Senate precedents.[142]

Moreover, the courts have done little to clarify the meaning of the ineligibility clause, which prohibits Senators and Representatives from being appointed "to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time."[143] As Judge Mikva knows from his own experience, the courts punt this constitutional issue back to Congress. Because of Mikva's longtime advocacy of gun control, the National Rifle Association (NRA) spent an estimated $700,000 to block his nomination to the United States Court of Appeals for the District of Columbia Circuit. When that effort was unsuccessful, the NRA went to court and raised the issue of ineligibility. With Senator McClure serving as plaintiff, the NRA argued that the salaries of federal judges had been increased during Mikva's term in Congress.[144] A three-judge court ruled that McClure lacked standing to challenge the validity of an appointment of a federal judge. The court stated that McClure and his colleagues had had their opportunity to vote against Mikva's confirmation in the Senate. Senators on the losing side could not then ask the judiciary to reverse the Senate's action.[145]

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[134] Coleman v. Miller, 307 U.S. 433, 453 (1939) (Congress had final determination on number of years needed to ratify the Child Labor Amendment).

[135] Baker v. Carr, 369 U.S. 186, 217 (1962).

[136] Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

[137] U.S. CONST. art. I, § 9, cl. 17.

[138] United States v. Richardson, 418 U.S. 166 (1974).

[139] L. FISHER, *supra* note 10, at 249-51.

[140] U.S. CONST. art. I, § 6, cl. 2.

[141] *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (class action challenging the Reserve membership of members of Congress as violating the incompatibility clause dismissed for lack of standing).

[142] 6 C. CANNON'S PRECEDENTS, *supra* note 86, §§ 60-65; 2 L. DESCHLER'S PRECEDENTS 124-39 (1977); 1 A. HINDS' PRECEDENTS, *supra* note 86, §§ 485-506.

A member's ability to gain standing does not mean that courts will decide a constitutional question. After passage of the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, twenty members of the House of Representatives filed suit to contest what they regarded to be the Senate's violation of the origination clause.[146] The House had passed a bill reducing tax revenues and the Senate had added amendments to increase revenues by more than $98 billion over three years.[147] A motion by Congressman Rousselot to return the bill to the Senate to correct what he considered a contravention of the origination clause was tabled by the House.[148] Although the United States Court of Appeals for the District of Columbia Circuit concluded that the congressional appellants had standing to challenge the constitutionality of the tax bill under the origination clause, it dismissed the case as an exercise of its discretion to withhold declaratory relief for prudential reasons.[149] The court stated that it was "reluctant to meddle in the internal affairs of the legislative branch, and the doctrine of remedial discretion properly permits us to consider the prudential, separation-of-powers concerns posed by a suit for declaratory relief against the complainant's colleagues in Congress."[150]

### D. *Institutional Capability*

Judge Mikva claims that "most Supreme Court opinions never come to the attention of Congress. Unlike judges, the Representatives and Senators are almost totally dependent on the recommendations of others in making constitutional judgments."[151] His first sentence is footnoted to a study published in 1965.[152] The author of that study, Samuel Krislov, did not offer documentation or support for his claim, and there is reason to doubt the sweeping nature of the statement. More significantly, the institutional capability of Congress has improved markedly since 1965.

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[143] U.S. CONST. art. I, § 6, cl. 2; *see Ex parte* Levitt, 302 U.S. 633 (1937) (per curiam); 42 Op. Att'y Gen. 381 (1969); 33 Op. Att'y Gen. 88 (1922).

[144] Benenson, *A Well-Armed NRA Draws a Bead on High-Calibre Judge*, NAT'L L.J., October 13, 1980, at 15, 40.

[145] McClure v. Carter, 513 F. Supp. 265 (D. Idaho), *aff'd sub nom*. McClure v. Reagan, 454 U.S. 1025 (1981).

[146] "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. CONST. art. I, § 7, cl. 1.

[147] Moore v. United States House of Representatives, 733 F.2d 946, 948-49 (D.C. Cir. 1984).

[148] *Id.* at 949.

[149] *Id.* at 956.

[150] *Id.*

The Legislative Reorganization Act of 1970[153] explicitly recognized the need within Congress for a more systematic and continuing review of court decisions that affect legislative prerogatives. Congress had been represented in court by the Department of Justice and the occasional appearances of Senators, Representatives, and attorneys acting as amici curiae, but this sporadic effort was unsatisfactory. A Senate committee in 1966 concluded that the effect of court decisions on Congress "should be a matter of continuous concern for which some agency of the Congress should take responsibility."[154]

The 1970 statute created a Joint Committee on Congressional Operations and made it responsible for identifying "any court proceeding or action which, in the opinion of the Joint Committee, is of vital interest to the Congress, or to either House of the Congress, as a constitutionally established institution of the Federal Government . . . ."[155] Congress directed the Joint Committee to make periodic reports and recommendations to the Senate and House.[156]

Starting in 1971, the Joint Committee began publishing a series of reports on legal proceedings of interest to Congress. After the Joint Committee's tenure expired in 1977, the task of publishing the report fell to a newly created House Select Committee on Congressional Operations, working in conjunction with the Senate Committee on Rules and Administration. Senate Rule XXV charges the Senate committee with the duty of identifying "any court proceeding or action which, in the opinion of the Committee, is of vital interest to the Congress as a constitutionally established institution of the Federal Government and [of] call[ing] such proceeding or action to the attention of the Senate."[157]

When the House decided to discontinue the Select Committee, the House Judiciary Committee inherited the responsibility for producing *Court Proceedings and Actions of Vital Interest to the Congress*. These reports are extraordinarily helpful in following litigation on such issues as the speech or debate clause, the congressional investigative power, disputed elections, constitutional qualifications of members of Congress, and congressional access to executive branch information, as well as the litigation efforts of individual members of Congress. In addition to providing a history of legal disputes that reach the courts, *Court Proceedings and Actions of Vital Interest to the Congress* reprints the full decisions, many of which are not reported elsewhere.

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[151] Mikva, *supra* note 1, at 609.

[152] S. Krislov, The Supreme Court in the Political Process 144 (1965).

[153] Pub. L. No. 91-510. 84 Stat. 1140 (1970).

[154] S. Rep. No. 1414, 89th Cong., 2d Sess. 47 (1966).

[155] Pub. L. No. 91-510, § 402(a)(2), 84 Stat. 1140, 1187 (1970).

[156] *Id.* § 402(c).

[157] S. Doc. No. 1, 98th Cong., 2d Sess. 35 (1984).

In recent years members of Congress have become concerned about the refusal of the Justice Department to defend the constitutionality of certain statutory provisions. The Department has taken this position in cases in which it believed that a statute infringed on presidential power[158] or was so patently unconstitutional that it could not be defended.[159] As a result of language placed in authorization acts for the Justice Department, the Attorney General now must report to Congress whenever the Department does not intend to defend the constitutionality of a law passed by Congress.[160] These reports must specify the statutory provision and explain why the Department regards it as unconstitutional.

Congress always has been able to hire private counsel to defend itself, as it did in the civil action brought against it by Congressman Adam Clayton Powell in the 1960s.[161] There was no established procedure for Congress to defend its statutes, however, when the Justice Department chose not to. The institutional interests of Congress, as noted by the Senate Committee on Governmental Affairs in 1977, made it "inappropriate as a matter of principle and of the constitutional separation of powers for the legislative branch to rely upon and entrust the defense of its vital constitutional powers to the advocate for the executive branch, the Attorney General."[162] The committee recalled that in both *Doe v. McMillan*[163] and *Eastland v. United States Servicemen's Fund*,[164] which involved investigative powers of Congress, the Justice Department withdrew its representation of Congress just as the litigation reached the Supreme Court.[165]

As part of the Ethics in Government Act of 1978,[166] the Senate established the Office of Senate Legal Counsel.[167] The Senate Legal Counsel and the Deputy Legal Counsel are appointed by the President pro tempore of the Senate from recommendations submitted by the Senate Majority and Minority Leaders. Appointments become effective upon approval by resolution of the Senate.[168] The principal duty of the Counsel is to defend the Senate or a committee, subcommittee, member, officer, or employee of the Senate when so directed by either a two-thirds vote of the members of the Joint Leadership Group or by the adoption of a Senate resolution. The Joint Leadership Group consists of the Majority and Minority Leaders of the Senate, the President pro tempore, and the chairman and ranking minority member from the Judiciary and the Rules and Administration Committees of the Senate.[169] When directed by Senate resolution, the Counsel may bring a civil action to enforce a subpoena issued by the Senate, or by a Senate committee or subcommittee, or intervene or appear as amicus curiae in cases involving the powers and responsibilities of Congress.[170] In the House of Representatives, the office of the Clerk of the House handles litigation that involves House members, officers, and staff. Decisions to litigate are made by a bipartisan leadership committee.[171] Legal work is done by three attorneys in the office of the Clerk of the House, and is supported by outside consultants.

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[158] *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926). The Supreme Court invited Senator George Wharton Pepper to represent Congress as amicus curiae. *Id.* at 56-57.

[159] *See, e.g.*, United States v. Lovett, 328 U.S. 303 (1946); *Representation of Congress and Congressional Interests in Court, Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 6 (1976).

[160] Pub. L. No. 96-132, §21, 93 Stat. 1040, 1049-50 (1979) (codified at 18 U.S.C. § 519 note (1982)).

[161] Powell v. McCormack, 395 U.S. 486 (1969).

[162] S. REP. No. 170, 95th Cong., 1st Sess. 11 (1977).

[163] 412 U.S. 306 (1973).

[164] 421 U.S. 491 (1975).

[165] S. REP. No. 170, 95th Cong., 1st Sess. 12 (1977).

[166] Pub. L. No. 95-521, 92 Stat. 1824, 1875 (1978) (codified at 2 U.S.C. § 288 (1982)).

[167] The Office of Senate Legal Counsel consists of four attorneys and a small support staff.

[168] 2 U.S.C. § 288(a)(3)(A) (1982).

Members of Congress also have access to other sources of legal assistance. Congressional hearings attract testimony from administration witnesses, constitutional scholars, and representatives of various private organizations. Committee staff can analyze constitutional questions and call on the American Law Division of the Library of Congress, which is staffed with approximately fifty attorneys specializing in different subject areas. The Office of the Legislative Counsel of the House and the Office of the Legislative Counsel of the Senate, established to assist members in drafting bills and resolutions, also provide constitutional advice.[172] The General Accounting Office (GAO) has approximately 140 attorneys in its Office of General Counsel, but the GAO generally regards it as inappropriate to question the constitutionality of a statute unless the Supreme Court already has ruled on the constitutionality of a similar piece of legislation.[173]

Another striking development over the past decade is the frequency with which members of Congress have turned to the courts for assistance. During the impoundment disputes of the Nixon Administration, members submitted an amicus curiae brief on behalf of plaintiffs suing the Administration.[174] In the abortion funding case eventually decided by the Supreme Court in 1980, the district court permitted Senators James Buckley and Jesse Helms and Congressman Henry Hyde to intervene as defendants.[175] The United States Court of Appeals for the Ninth Circuit invited both the House and the Senate to submit briefs concerning a legislative veto used by Congress in deportation matters.[176] When the case reached the Supreme Court, both Houses of Congress had intervened to protect their institutional interests and fully participated before the Court. The attorneys for Congress defended the legislative veto, but in a separate brief nine members of the House urged the Supreme Court to declare the legislative veto unconstitutional [177]

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[169] *Id.* § 288a.

[170] *Id.* §§ 288b-288e.

[171] *See* 2 *Legislative Branch Appropriations for 1985: Hearings Before the House Comm. on Appropriations*, 98th Cong., 2d Sess. 225 (1984).

[172] 2 U.S.C. §§ 271-282e (1982). There are approximately 17 attorneys in the Senate office and approximately 35 in the House office.

[173] UNITED STATES GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-7 (June 1982); Letter from Charles A. Bowsher, Comptroller General, to Congressman Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, July 26, 1984.

[174] State Highway Comm'n of Mo. v. Volpe, 479 F.2d 1099 n.1 (8th Cir. 1973).

[175] Harris v. McRae, 448 U.S. 297, 303 (1980).

[176] Chadha v. INS, 634 F.2d 408, 411 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983).

Senator Edward Kennedy was successful at both the district court and the appellate court level in challenging President Nixon's attempt to use the "pocket veto" during brief recesses of the House and Senate.[178] Kennedy succeeded because his prerogative to vote to override a presidential veto had been denied by the pocket veto. Other members of Congress, however, have been unsuccessful when they have tried to achieve political goals in the courts rather than through the regular legislative process. In such cases the members have been told by the courts that they lack standing to sue, the issue is not ripe for adjudication, or the matter is a "political question" to be decided by Congress and the President.[179] A legislator must overcome those standing hurdles—faced by any litigant—by showing that (1) he has suffered injury, (2) the interests are within the zone protected by the statute or constitutional provision, (3) the injury is caused by the challenged action, and (4) the injury can be redressed by a favorable court action.[180] Legislators, however, face an additional obstacle: if they suffer from an injury that can be redressed by their colleagues acting through the regular legislative process, a court may exercise "equitable discretion" and dismiss the action.[181]

These cases reflect a general wariness on the part of judges that the controversy actually is not between Congress and the President, but instead is a dispute between opposing groups of legislators. Federal judges may suspect that members of Congress turn to the courts because they have been unable to attract enough votes to pass a bill. Thus, when legislators fail to make use of the remedies available within Congress, they have been denied standing to resolve the issue in court.[182]

## III. THREE CASE STUDIES

Judge Mikva examined three recent efforts by Congress to engage in constitutional deliberation: the 1974 extension of minimum wages to employees of state and local governments, the Senate's adoption in 1982 of a legislative veto for agency rulemaking, and the provision in the 1970 Organized Crime Control Act allowing increased sentences for dangerous special offenders on appellate review. According to Judge Mikva, the three examples "raise questions concerning Congress' ability to make constitutional judgments and its role as guardian of the Constitution."[183] While admitting that the three examples are not "exhaustive," Judge Mikva views them as "good illustrations of Congress' relationship with the Constitution."[184] A review of the three case studies reveals that they do not call into question Congress' ability to make constitutional judgments. Rather, the record suggests that Congress was reasonably informed and careful in its deliberations. Its judgments compare favorably to those announced by the courts.

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[177] *Motion for Leave to File and Brief of Certain Members of the United States House of Representatives, amicus curiae*, INS v. Chadha, 103 S. Ct. 2764 (1983) (Nos. 80-1832, 80-2170, 80-2171, filed January 8, 1982).

[178] Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), *aff'g* 364 F. Supp. 1075 (D.D.C. 1973).

[179] Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977).

[180] *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 13 (4th ed. 1983).

[181] *See, e.g.*, Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); Harrington v. Bush, 553 F.2d 190, 204-05 (D.C. Cir. 1977); Goldwater v. Carter, 481 F. Supp. 949, 951 (D.D.C. 1979).

[182] *See, e.g.*, Reuss v. Balles, 584 F.2d 461, 468 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 997 (1978); Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Public Citizen v. Sampson, 379 F. Supp. 662 (D.D.C. 1974); *see also* McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981) (Supreme Court also relies on ripeness and political question doctrines; author suggests expansion of use of discretion as alternative).

### *A. The Fair Labor Standards Amendments of 1974*

The Fair Labor Standards Amendments of 1974[185] extended the minimum wage level set by the Fair Labor Standards Act,[186] bringing employees of state and local governments within the reach of the Act. Before 1974 federal law defined "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State . . . ."[187] The 1974 Amendments deleted the language beginning with "but shall."[188] Two years later the Supreme Court in *National League of Cities v. Usery*,[189] a case it has since overruled,[190] invalidated the extension as unconstitutional because it "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions . . . ."[191]

The Court's decision, Judge Mikva noted, "came as a complete surprise to Congress. What little constitutional discussion there had been in Congress had centered on whether it was appropriate to invoke the commerce power to extend the Fair Labor Standards Act to governmental employees."[192] The Senate Labor and Public Welfare Committee concluded that the activities of public sector employees affected interstate commerce and therefore justified the extension of minimum wages to state and local employees.[193] Congress also assumed that the Supreme Court had settled the issue in *Maryland v. Wirtz*,[194] a case which had upheld by an eight-to-one vote an extension of the Fair Labor Standards Act to employees of hospitals and schools operated by state and local governments.

Judge Mikva is correct that *National League of Cities* came as a "complete surprise" to members of Congress. It also came as a surprise to constitutional scholars and to the four dissenting Justices. Justice Brennan, joined by Justices White and Marshall, stated that "[i]t must . . . be surprising that my Brethren should choose this bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall . . . ."[195] Justice Brennan could not recall

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[183] Mikva, *supra* note 1, at 590.

[184] *Id.* at 591.

[185] Pub. L. No. 93-259, 88 Stat. 55 (1974) (codified at 29 U.S.C. §§ 202-208, 210, 212-214, 216, 255, 260 (1982)).

[186] 29 U.S.C. §§ 201-219, 255, 260 (1982).

[187] Pub. L. No. 75-718, § 3(d), 52 Stat. 1060, 1060 (1938).

[188] Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55, 58 (1974).

[189] 426 U.S. 833, 852 (1976).

[190] Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

[191] *National League of Cities*, 426 U.S. at 852.

[192] Mikva, *supra* note 1, at 591.

[193] S. REP. No. 690, 93d Cong., 2d Sess. 24 (1974).

[194] 392 U.S. 183 (1968).

> another instance in the Court's history when the reasoning of so many decisions covering so long a span of time has been discarded in such a roughshod manner. That this is done without any justification not already often advanced and consistently rejected, clearly renders today's decision an *ipse dixit* reflecting nothing but displeasure with a congressional judgment.[196]

Justice Stevens' separate dissent remarked that the "principle on which the [majority's] holding rests is difficult to perceive."[197]

In reviewing the legislative history of the Fair Labor Standards Amendments of 1974, Judge Mikva stated that it is clear that the line of reasoning in *National League of Cities* "was not anticipated" by Congress.[198] It also may not have been anticipated by anyone else. *National League of Cities* has not strengthened the cause of federalism when Congress acts under its enforcement powers pursuant to the fourteenth and fifteenth amendments,[199] and it appears that the decision was little more than an aberrant holding that since has been reversed.

The important issue is not the failure of Congress to anticipate *National League of Cities*, but rather the subsequent decisions that foretold that the rule in *National League of Cities* would be overturned and Congress' initial constitutional interpretation would prevail. In *EEOC v. Wyoming*,[200] a federal district court held that the Age Discrimination in Employment Act violated the tenth amendment theory articulated in *National League of Cities*.[201] Justice Brennan, writing for a majority of the Supreme Court, reversed the judgment of the district court. In a concurring opinion, Justice Stevens stated that the only basis for questioning the age discrimination statute

> is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*. Neither the Tenth Amendment, nor any other provision of the Constitution, affords any support for that judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause.[202]

Justice Stevens' opinion implied that *National League of Cities* deserved to be placed in the same category as other decisions repudiated by the Court. Notwithstanding his respect for the doctrine of stare decisis, he advised that "the law would be well served by a prompt rejection of *National League of Cities'* modern embodiment of the spirit of the Articles of Confederation."[203]

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[195] *National League of Cities*, 426 U.S. at 857 (Brennan, J., dissenting).

[196] *Id.* at 871-72 (Brennan, J., dissenting).

[197] *Id.* at 880 (Stevens, J., dissenting).

[198] Mikva, *supra* note 1, at 593.

[199] *See* City of Rome v. United States, 446 U.S. 156, 178-80 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[200] 460 U.S. 226 (1983).

[201] EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), *rev'd*, 460 U.S. 226 (1983).

[202] EEOC v. Wyoming, 460 U.S. at 248 (Stevens, J., concurring).

Shortly thereafter, the Supreme Court accepted a case that eventually reversed *National League of Cities.*[204] In *Garcia v. San Antonio Metropolitan Transit Authority,*[205] the Court asked the parties to brief and argue the following question: "Whether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery . . . should be reconsidered?"[206] On February 19, 1985, a five-to-four decision by the Supreme Court overturned the ruling in *National League of Cities.*[207] Justice Blackmun authored the Opinion of the Court in *Garcia* that negated the *National League of Cities* majority opinion, with which he had concurred less than ten years before.

### *B. The Legislative Veto*

Judge Mikva cited four constitutional challenges to the reliance by Congress on legislative vetoes: the doctrine of separation of powers, the requirement of bicameral action by Congress, the presentment clause of the Constitution, and excessive delegation of legislative power.[208] With regard to the first point, he argued that through the use of the legislative veto to control delegated power, "Congress intrudes upon the executive branch and begins to exercise administrative discretion. Because the veto procedure circumvents the executive, Congress, in effect, makes the President a subordinate."[209] This latter statement does not take into account several features of the legislative veto that make Congress, in effect, subordinate to the President. A review of the origin of the legislative veto reveals its many-sided character.

The legislative veto emerged in the 1930s as a technique for reconciling two conflicting needs. Executive officials wanted to broaden their discretionary authority and avoid the limitations of the full statutory process. Members of Congress consented only on the condition that they could retain a control mechanism that would not require passage of a public law. Both branches wanted shortcuts. The resulting accommodation permitted Presidents and administrators to make proposals that would become law within a stated period unless Congress disapproved by a one-house or two-house veto. Because Congress would be acting by a simple resolution or a concurrent resolution, the resolution would not go back to the President for his signature or veto. As it evolved, the legislative veto included requirements for congressional approval as well as disapproval and vested some of the controls in congressional committees.[210]

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[203] *Id.* at 250 (Stevens, J., concurring).

[204] The Supreme Court noted probable jurisdiction on October 3, 1983. 52 U.S.L.W. 3261 (1983), the same year in which the EEOC v. Wyoming decision was rendered. The Court accepted the case directly from the district court. San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Auth., 105 S. Ct. 1005 (1985).

[205] 105 S. Ct. 1005 (1985).

[206] 52 U.S.L.W. 3937 (1984). For oral argument on reconsideration of *National League of Cities, see* 53 U.S.L.W. 3255 (1984).

[207] *Garcia,* 105 S. Ct. at 1007.

[208] Mikva, *supra* note 1, at 593-94.

[209] *Id.* at 593.

This procedure obviously departed from the customary procedure of having Congress pass a bill and present it to the President.[211] It is not true, however, that Congress arbitrarily imposed an unconstitutional process on a reluctant President in an effort to make him a subordinate. Congress never claimed that it could exercise control over the President simply by passing one-house and two-house vetoes. Such a procedure clearly violates the presentment clause. A different issue arises, however, when the use of legislative vetoes is sanctioned by a prior public law. As far back as 1854, the Attorney General had recognized that the legislative effect of simple or concurrent resolutions would be changed fundamentally if authorized by law. Attorney General Cushing stated that a simple resolution could not coerce a department head

> unless in some particular in which a law, duly enacted, has subjected him to the direct action of each [House]; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House.[212]

In the view of the Attorney General, there was nothing unconstitutional about departing from a strict reading of the legislative procedure if both branches agreed. The departure had to be mutually satisfactory, and for much of our history it was.

The record of the legislative veto is replete with such accommodations. The early forms of the legislative veto clearly favored the President. Congress gave President Hoover authority to reorganize executive agencies; his proposals would take effect as law within sixty days unless either house disapproved.[213] Although the House of Representatives subsequently rejected all of Hoover's reorganization proposals,[214] the procedure was highly beneficial to the President. Hoover did not have to secure the support of both Houses as required by the regular legislative process. Instead, the burden was placed on Congress to prevent his plans from taking effect. Although the constitutional process was turned on its head, the advantage fell essentially to the President, not to Congress. Moreover, other expedited features served the interests of the President. Hoover's proposals could not be buried in committee, filibustered, or amended by Congress, either in committee or on the floor. Members of Congress were limited to a yes-or-no vote.[215]

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[210] *See* L. FISHER, *supra* note 10, at 162-64.

[211] U.S. CONST. art. I, § 7.

[212] 6 Op. Att'y Gen. 680, 683 (1854).

[213] Pub. L. No. 72-212, 47 Stat. 382, 413-15 (1932).

[214] *See* 76 CONG. REC. 2125-26 (1933). For details on the history of reorganization authority, see Fisher & Moe, *Delegating With Ambivalence: The Legislative Veto and Reorganization Authority*, in STAFF OF HOUSE COMM. ON RULES, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO 164-247 (Comm. Print 1980).

[215] *See* Pub. L. No. 72-212, § 407, 47 Stat. 382, 413 (1932).

The prohibition on congressional amendments demonstrates that Congress was sensitive to constitutional requirements. If Congress had been able to amend Hoover's proposals without returning the amended versions to the President for his signature or veto, the legislative process would have been subverted. Congress could have made "new law" without presidential participation. Under the reorganization statutes, however, Presidents retained exclusive control over the content of reorganization plans.[216]

Constitutional issues also were debated carefully in the late 1930s after President Roosevelt asked Congress to renew the authority to reorganize executive agencies. He insisted that the only constitutional form of congressional disapproval would be by bill or joint resolution. Action by simple or concurrent resolution, he believed, would not be legally binding.[217] Members of the House of Representatives refused to delegate reorganization authority if they could maintain control only by passing a bill or joint resolution, either of which the President could veto. They did not want to be required to produce extraordinary majorities in each House to override vetoes and maintain control over delegated power.

Both branches then sought an accommodation that respected the needs of the President and Congress. To receive the authority he wanted, Roosevelt accepted congressional action by concurrent resolution. Both branches agreed that any attempt by Congress to use concurrent resolutions to control past laws would be unconstitutional. It would be permissible, however, for Congress to use a two-house disapproval over a reorganization proposal, which was called a law "in the making."[218] Defeat of a reorganization proposal would merely preserve the status quo, leaving the structure of government unchanged. This compromise satisfied both branches until 1982, when the Justice Department advised the Supreme Court that it no longer accepted as constitutional the legislative veto in reorganization statutes.[219] It took fifty years for the Justice Department to oppose the legislative veto in all its forms, and then only under the realization that it was intellectually inconsistent to support the legislative veto in the reorganization statutes[220] while condemning all others.

Whatever legal misgivings Presidents may have had about the legislative veto in reorganization acts, they did not acquiesce in the spirit of subserviency. They acquiesced because it was to their advantage. Presidents who wanted the authority took the conditions that went with it. The Nixon Administration, for example, never uttered a word of protest when the Impoundment Control Act of

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[216] Legislation passed in 1977 allowed amendments to reorganization plans, but only those amendments submitted by the President. Pub. L. No. 95-17, § 903(c), 91 Stat. 29, 31 (1977) (codified at 5 U.S.C. 904 (1982)).

[217] 83 Cong. Rec. 4487 (1938).

[218] *Id.* at 5004-05.

[219] Brief for the Immigration and Naturalization Service at 58 n.37, INS v. Chadha, 103 S. Ct. 2764 (1983).

[220] *See* 43 Op. Att'y Gen. No. 10 (Jan. 31, 1977) (Attorney General Griffin Bell's strained effort to distinguish the legislative veto in the reorganization statute from other types of legislative vetoes).

1974[221] authorized the President to defer the spending of funds subject to a one-house veto. It wanted the authority and accepted the condition, in part to avoid the dreary round of defeats it had suffered in the federal courts. No one in the Ford, Carter, or Reagan Administrations ever suggested that the one-house veto over deferrals was in any sense unconstitutional.

Congress added a legislative veto to the War Powers Resolution of 1973.[222] To argue that this statutory provision made the President subservient to Congress would overlook the series of unilateral actions taken by Presidents Johnson and Nixon to widen the war in Southeast Asia. While a member of Congress, Mikva wrote a law review article in which he urged Congress to place statutory constraints on the President's ability to make war.[223] As a tool for reining in the President, he looked with particular hope to the power of the purse as embodied in the Cooper-Church Amendment.[224] His article appeared in 1971, before Congress had begun to consider seriously a legislative veto to accommodate legislative-executive interests in the war power area.

The legislative veto was adopted after Congress met frustration in its power-of-the-purse efforts. Members tried to stop the war in the spring of 1973 by cutting off funds, but they discovered that a majority in each House was insufficient leverage to control the President. President Nixon vetoed the bill and Congress failed to override.[225] Did this inability to override the veto constitute implicit approval of the President's policy? District Judge Judd said that "[i]t cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized."[226] Thus, the purpose of the legislative veto in the War Powers Resolution was to prevent Presidents from conducting wars with only minority backing from Congress.

Arms sales, subject to a two-house veto, represent another area that relied on a legislative veto to accommodate the competing interests of Congress and the President. During a briefing in 1978, Attorney General Griffin Bell was asked if President Carter would feel bound if Congress, by concurrent resolution, vetoed his Mideast arms sales package. Bell replied:

> He would not be bound in our view, but we have to have comity between the branches of government, just as we have between nations. And under a spirit of comity, we could abide by it, and there would be nothing wrong with abiding by it. We don't have to have a confrontation every time we can.[227]

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[221] Pub. L. No. 93-344, 88 Stat. 332 (1974).

[222] Pub. L. No. 93-148, 87 Stat. 555 (1973).

[223] Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 485-97 (1971).

[224] *Id.* at 487. The Cooper-Church Amendment established a number of restrictions on the use of American military force in Cambodia. *See id.* at 486 n.107 (text of amendment).

[225] L. FISHER, PRESIDENTIAL SPENDING POWER 114-17 (1975).

[226] Holtzman v. Schlesinger, 361 F. Supp. 553, 565 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

[227] Office of the White House Secretary, *Briefing by Attorney General Griffin B. Bell, Stuart E.*

White House adviser Stuart Eizenstat added:

> I think the point the Judge [Bell] is making is that we don't concede the constitutionality of any of [the legislative vetoes] yet, but that as a matter of comity with certain of these issues where we think the Congress has a legitimate interest, such as the War Powers Act, as a matter of comity, we are willing to forego the specific legal challenge and abide by that judgment because we think it is such an overriding issue.[228]

The legislative veto began as an accommodation between the branches. There was never any question of one branch becoming subservient to another. When the basis for that accommodation started to erode in the 1970s, the legislative veto had run its course. The collapse of the agreement, however, does not justify the sweeping language of the decisions of the courts of appeals[229] and the Supreme Court.[230] Apparently Judge Mikva would agree. In one of the decisions of the United States Court of Appeals for the District of Columbia Circuit, decided about six months before the Supreme Court's ruling in *INS v. Chadha*,[231] Judge Mikva expressed concern about the broad nature of his court's rulings on the legislative veto. In a joint statement with Judge Wald, he asked the court to rehear a legislative veto case en banc:

> [V]itally important issues of executive-legislative relations are articulated too broadly and explored inadequately in the panel opinion. We are especially concerned that the panel's opinion lumps together for automatic rejection under the rubric of "legislative vetoes" several different kinds of statutory provisions, each entailing a distinct accommodation between the executive and legislative branches. Such black-and-white treatment of these statutes ignores a largely gray area that has existed for 200 years in our constitutional scheme. . . .
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> We write separately to underscore our concern that language in the panel's opinion not be read to foreclose careful consideration in subsequent cases of historical experience, practical working relationships, and the deference due Congress when it establishes its own procedures under the Constitution. . . . We are convinced that [the one-house vetoes in the Reorganization Act and the Impoundment Control Act] cannot simply be invalidated under the reasoning of our prior opinions without detailed examination of how such arrangements operate and what they are designed to accomplish.[232]

After the Supreme Court decided *Chadha*, Judge Mikva testified before a Senate

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*Eizenstat, Assistant to the President for Domestic Affairs and Policy, and John Harmon, Office of Legal Counsel*, June 21, 1978, at 4.

[228] *Id.*

[229] AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (per curiam); Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982).

[230] INS v. Chadha, 103 S. Ct. 2764 (1983).

[231] *Id.*

[232] AFGE v. Pierce, 697 F.2d 303, 308 (D.C. Cir. 1982) (Mikva, J., statement concerning denial of rehearing en banc).

committee on the virtues of the legislative veto and the defects of the Court's ruling:

> I understand and respect the need for the legislative veto, and I am here to extoll its virtues rather than to criticize its excesses, although I must say that I saw both while I was in the Congress.
>
> . . . I think that the Supreme Court decision is unfortunate . . . . I think that the Supreme Court overwrote *Chadha*. I think that they used their pen too broadly in trying to reach at the excesses and took away not only a necessary tool to the legislative process, but, indeed, wrote in a way that simply cannot be enforced. . . . [T]he court restrained the form in which the Congress may exercise the legislative veto, but the Court did not and cannot get at the substance, not unless it strikes down all of article I as unconstitutional.[233]

This Article is not the place for a detailed critique of the Supreme Court's ruling in *Chadha*. The author is unaware of any law review article that could be considered complimentary of the Court's reasoning or its understanding of modern government and the legislative process.[234] Over a period of decades, the level of debate within Congress was far more sophisticated and insightful on the constitutional issue than the simplistic and formalistic position of the Supreme Court. The level of constitutional analysis in *Chadha* scarcely overshadows the efforts of Congress over the preceding fifty years. Congress may have gone too far with the legislative veto—especially with the determination to apply it to all agency rules and regulations—but the underlying arguments in favor of this congressional tool were responsible and well informed. Congress took into account, far better than the Court, the complex factors involved in governing an administrative state, the large-scale delegations of legislative power to the executive branch, and the need for executive-legislative cooperation.

The *Chadha* Court's misreading of history and congressional procedures will yield some strange results; its theory of government is too much at odds with the practices developed over a half century. Few administrators or legislators will want the static model advanced by the Court. The conditions that spawned the legislative veto in the 1930s have not disappeared. Executive officials still want substantial latitude in administering delegated authority; legislators still insist on retaining control without having to pass another law. After *Chadha*, congressional committees will continue to use informal and nonstatutory methods to control administrative actions by the executive branch. Agencies are allowed some flexibility to shift funds through the "reprogramming" process, provided they obtain the approval of designated committees.[235] Because these "gentlemen's agreements" generally are not placed in statutes, they are unaffected by the Court's decision. They are not legal in effect; they are, however, in effect legal.

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[233] *Constitutional Amendment to Restore Legislative Veto: Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 40-41 (1984).

[234] For some detailed critiques, see L. FISHER, *supra* note 10, at 178-83; Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125; Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789.

[235] L. FISHER, *supra* note 225, at 75-98.

Not surprisingly, Congress has continued to place legislative vetoes in bills presented to the President. Despite *Chadha*, they are signed into law.[236] In the first sixteen months after *Chadha*, Congress enacted eighteen bills incorporating fifty-three legislative vetoes.[237] Because of the accommodations needed for contemporary government, agencies can be expected to comply with these legislative vetoes, which are generally of the committee variety. One unfortunate result of the Court's decision is that it promises a form of government that does not and cannot prevail.

Judge Mikva objects to the Senate's adoption in 1982 of the Schmitt Amendment, which would have applied the legislative veto to all agency rules. Senator Schmitt, however, did what Judge Mikva apparently would like all members to do. Schmitt made his own judgment—a favorable one—on the constitutionality of the legislative veto, notwithstanding contrary rulings by the United States Court of Appeals for the District of Columbia Circuit.[238] As Judge Mikva noted, the Senators in favor of the Schmitt amendment "went to great lengths to assert the need for Congress to make its own judgments of constitutionality."[239]

On the other hand, Senators Leahy and Danforth opposed the Schmitt Amendment by arguing "the pendency of the issue before the Supreme Court, as well as the D.C. Circuit decision in a very similar case that resolved the constitutional doubts against the veto provision. . . ."[240] Both Senators wished to defer to the courts for a resolution. Senator Danforth stated that Congress

> is not the forum for debating the issue of constitutionality of the legislative veto. The fact of the matter is that it is irrelevant whether we debate it in the Senate, the issue is going to be decided one way or another by the Supreme Court of the United States. . . . [L]et us wait for the Supreme Court to speak.[241]

The positions taken by Senators Leahy and Danforth seem contrary to Judge Mikva's model of a responsible Congress. First, the two Senators were willing to pass the issue to the courts, which "is both an abdication of [the congressional] role as a constitutional guardian and an abnegation of its duty of responsible lawmaking."[242] Second, they based their conclusions not on independent analysis but on what courts had done or were likely to do. As Judge Mikva advised, "[a]cting like a lower federal court is certainly not what Jefferson envisioned for Congress; Congress should be able to make its own decisions rather than having to predict what the Supreme Court would do . . . ."[243]

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[236] Rothman, *Despite High Court Ruling, Legislative Vetoes Abound*, CONG. Q. WEEKLY REP., July 21, 1984, at 1797-98.

[237] The author's survey of this legislation is on file with the North Carolina Law Review.

[238] AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (per curiam); Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982).

[239] Mikva, *supra* note 1, at 600.

[240] *Id.* at 598.

[241] *Id.* at 599 n.61 (citing 128 CONG REC. S2596 (daily ed. March 23, 1982)).

[242] *Id.* at 610.

### *C. Section 3576 of the Organized Crime Control Act*

As part of an effort to counter the tendency of some trial judges to mete out light sentences in cases involving organized crime, Congress passed Title X of the Organized Crime Control Act of 1970.[244] Section 3576 allowed appellate courts to review and increase sentences.[245] According to Judge Mikva, the Senate Committee on the Judiciary reported the bill to the floor "without any constitutional hesitations."[246] It is difficult to probe the minds of committee members to discover whether they harbored any doubts or misgivings, but the committee report contains extensive analysis of the constitutional question of appellate review of sentences.[247] The committee considered both due process and double jeopardy. Based on available court decisions, the Justice Department concluded that "it would seem that if these cases are still good law today then the Government should be able to seek an increase in sentence on appeal without violating either due process or the Fifth Amendment ban on double jeopardy."[248]

The Senate committee therefore was aware that authority existed to support both sides of the question, but that, on balance, section 3576 appeared to be constitutional. To avoid due process problems, the committee adopted a number of procedural limitations on the right of the government to appeal a sentence.[249] That left the question of double jeopardy. Judge Mikva noted that the committee relied heavily on the testimony of the Department of Justice and Professor Peter Low.[250] Professor Low was not merely an academic; he was the reporter of the American Bar Association study on sentencing.[251] Moreover, in 1964 the United States Judicial Conference had "discussed fully and approved a bill to empower Federal appellate courts to increase or decrease lawful but inadequate or excessive sentences."[252]

Judge Mikva recalled his opposition to the bill during his service as a congressman from Illinois. He and two colleagues wrote dissenting views in the report issued by the House Judiciary Committee. Among their arguments, reprinted in Judge Mikva's article, were the following comments:

> Title X, were it not such a dangerous special offender itself, would be ludicrous, the product of a caveman's course on the Constitution. As it is, it contravenes the Constitution, it substitutes revenge for reason,

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[243] *Id.* at 607.

[244] Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of Title 18 of the United States Code).

[245] 18 U.S.C. § 3576 (1982) (appellate courts may increase a sentence only if the United States "takes review").

[246] Mikva, *supra* note 1, at 601.

[247] *See* S. REP. No. 617, 91st Cong., 1st Sess. 92-100 (1969).

[248] *Id.* at 93.

[249] *See id.* at 166-67.

[250] Mikva, *supra* note 1, at 601.

[251] S. REP. No. 617, 91st Cong., 1st Sess. 98 (1969).

[252] *Id.* at 99.

> and it flaunts the concept of fair treatment. It is [a] parody of justice made tragic by the damage it will do—to individuals, and more important, to our system of rule by law.[253]

A review of the Senate and House reports[254] does not support the image of a caveman's course on the Constitution; legal authorites are cited and analyzed. In contrast, the comments by Congressman Mikva and his two colleagues seem too rhetorical:

> This bill is another dreary episode in the ponderous assault on freedom. . . . [I]t is more likely to catch poachers and prostitutes than it is to catch pushers and pimps. . . . [I]t rips off large chunks of the Constitution. . . . [It is] a repressive shotgun which shoots down innocent and guilty with equal confidence.[255]

If the House and Senate Judiciary Committees behaved like cavemen, the Supreme Court apparently belongs in the same category. In *North Carolina v. Pearce*,[256] decided a year before Congress enacted the Organized Crime Control Act, the Court decided that there was no constitutional bar to imposing a more severe sentence on reconviction. The guarantee against double jeopardy, however, would be violated "when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction of the same offense."[257] *Pearce* dealt with the imposition of sentences after a new trial and reconviction;[258] section 3576 involved increases in existing sentences.[259]

The precise features of section 3576 came before the Court in *United States v. DiFrancesco*,[260] which upheld the provision by a five-to-four vote. Although the constitutional protection against double jeopardy prohibits a second trial following an acquittal,[261] the double jeopardy clause "is *not* a complete barrier to an appeal by the prosecution in a criminal case."[262] The Court stated that, historically, "the pronouncement of sentence has never carried the finality that attaches to an acquittal."[263] The Court cited studies indicating that sentencing is one of the areas of the criminal justice system most in need of reform, referring to Judge Frankel's observation that the basic problem of the present system is " 'the unbridled power of the sentencers to be arbitrary and discriminatory.' "[264] Justice Blackmun, writing for the Court, pointed out that appellate review "creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing."[265] When Congress passed legislation in 1984 to provide more systematic guidelines on sentencing,[266] the Senate Judiciary Committee stated that it was "an anomaly to provide for appellate correction of prejudicial trial errors and not to provide for appellate correction of incorrect or unreasonable sentences."[267] The committee reinforced Judge Frankel's views on the fairness issue:

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[253] Mikva, *supra* note 1, at 603 (citing H.R. REP. No. 1549, 91st Cong., 2d Sess. 193 (1970)).

[254] H.R. REP. No. 1549, 91st Cong., 2d Sess. (1970); S. REP. No. 617, 91st Cong., 1st Sess. (1969).

[255] H.R. REP. No. 1549, 91st Cong., 2d Sess. 181 (1970).

[256] 395 U.S. 711 (1969).

[257] *Id.* at 718.

[258] *Id.* at 722.

[259] 18 U.S.C. § 3576 (1982).

[260] 449 U.S. 117 (1980).

[261] *Id.* at 129.

[262] *Id.* at 132.

[263] *Id.* at 133.

[264] *Id.* at 142-43 (quoting M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1973)).

> It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government, on behalf of the public, to appeal and have increased a sentence that is below the applicable guideline and that is found to be unreasonable. If only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient . . . . The unequal availability of appellate review, moreover, would have a tendency to skew the system, since if appellate review were a one-way street, so that the tribunal could only reduce excessive sentences but not enhance inadequate ones, then the effort to achieve greater consistency might well result in a gradual scaling down of sentences to the level of the most lenient ones. Certainly the development of a principled and balanced body of appellate case law would be severly hampered.[268]

Judge Mikva felt that the constitutional support of the Senate and the House for section 3576 may have convinced the Court that "in part . . . its work had been done already."[269] He stated that in *DiFrancesco* the Court "was faced not only with the task of deciding a constitutional question, but also with the problem of confronting Congress if it disagreed with the legislation."[270] What was the alternative? Would it have been better for members of Congress to remain silent on the constitutional issue, keeping the slate clean for calm and undistracted judicial deliberation? Such conduct would expose members to Judge Mikva's charge that they irresponsibly pass the tough constitutional issues to the courts. Furthermore, the development of constitutional law provides strong evidence that the judiciary derives essential guidance from interpretations previously adopted by the legislative and executive branches.

## IV. Conclusion

The interests of constituional law and the political process are served best when members of Congress form independent judgments on constitutional issues. Most of these issues are within the capability of members, whether they have legal training or not. Constitutional issues often turn not so much on technical legal points but on a balancing of competing political and social values. Collisions occur between congressional regulation and federalism, state rights and civil rights, government regulation and individual privacy, free press and fair trial, congressional investigation and executive privilege, and other questions of priorities. Congress has adequate resources to analyze these constitutional issues. Although members should form their judgments with an awareness of what courts have decided, no need exists to follow those rulings in mechanical fashion. That a congressional interpretation or understanding of the Constitution may differ from the Court's is hardly reason to conclude that Congress *ignores* the Constitution—a charge that imputes legislative bad faith.

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[265] *Id.* at 143.

[266] Pub. L. No. 98-473, § 213, 98 Stat. 1837, 2011 (1984).

[267] S. Rep. No. 223, 98th Cong., 1st Sess. 147 (1983).

[268] *Id.* at 148.

[269] Mikva, *supra* note 1, at 605.

[270] *Id.*

Even after courts hand down a decision, there are opportunities for Congress to test the soundness of the decision by passing new legislation and supporting further litigation. The history of child labor legislation offers a striking example. The first child labor law passed by Congress was based on the commerce power. The Supreme Court invalidated that statute in 1918.[271] The second congressional attempt, based on the taxing power, was invalidated in a 1922 decision.[272] Congress then passed a constitutional amendment in 1924, which would have given it the power to regulate child labor. By 1937, however, only twenty-eight of the necessary thirty-six states had ratified the amendment. On its final effort, Congress returned to the commerce power by including a child labor provision in the Fair Labor Standards Act of 1938.[273] This time the Court upheld the statute.[274]

Another example of congressional independence concerns the Civil Rights Act of 1964.[275] Basing this statute solely on the fourteenth amendment would have risked a head-on collision with *The Civil Rights Cases*[276] of 1883, which never had been overruled. Congress chose the commerce power as an alternative constitutional foundation for the Civil Rights Act,[277] and the Supreme Court upheld the Act by finding in the commerce power sufficient congressional authority.[278]

Congressional-Court dialogues need not consume decades before Congress alters the shape of a Supreme Court decision. Title II of the Omnibus Crime Control and Safe Streets Act of 1968[279] modified three controversial Court rulings on criminal procedure. The first, *Mallory v. United States*,[280] held that suspects must be taken before a magistrate for arraignment as quickly as possible.[281] Additionally, admissions obtained from the suspect during illegal detainment could not be used against him. The Court made room for congressional involvement by basing its decision not solely on constitutional grounds, but also on the Federal Rules of Criminal Procedure enacted by Congress.[282] The decision thus invited Congress to enter the arena and modify those rules. Congress did so: Title II established six hours as a reasonable period before arraignment.[283] Congressional action was justified as a modification of the Federal Rules of Criminal Procedure even though constitutional issues clearly were present.

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[271] Hammer v. Dagenhart, 247 U.S. 251 (1918).

[272] Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

[273] Pub. L. No. 75-718, § 12, 52 Stat. 1060, 1067 (1938).

[274] United States v. Darby, 312 U.S. 100 (1941).

[275] Pub. L. No. 88-352, 78 Stat. 241 (1964).

[276] 109 U.S. 3 (1883).

[277] D. MORGAN, *supra* note 9, at 292-330.

[278] *See* Katzenbach v. McClung, 379 U.S. 294, 305 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964).

[279] Pub. L. No. 90-351, 82 Stat. 197 (1968).

[280] 354 U.S. 449 (1957).

[281] *Id.* at 454.

In the second case, *Miranda v. Arizona*,[284] the Court held that confessions by criminal suspects could not be used unless the suspects had been informed of their rights by law enforcement officers.[285] It is unclear whether the majority opinion was based on constitutional principles or statutory rules of evidence. The Court reviewed the history of the fifth amendment privilege against self-incrimination,[286] spoke of the "constitutional issue we decide in each of these cases,"[287] and stated that "the issues presented are of constitutional dimensions and must be determined by the courts."[288] The Court also referred to the Federal Rules of Criminal Procedure[289] and invited Congress to contribute its own handiwork.[290] Congress did so again: Title II allowed for the admissibility of confessions if voluntarily given.[291] Trial judges would determine the issue of voluntariness after taking into consideration all the circumstances surrounding the confession, including five elements identified by Congress.[292]

In the third case, *United States v. Wade*,[293] the Court decided that if an accused was denied the right to counsel during a police lineup, the identification would be inadmissible unless the in-court identifications had an independent source or the introduction of the evidence would be harmless error.[294] The Court stated that "[l]egislative or other regulations, such as those developed by the local police departments, [might] eliminate the risks of abuse and unintentional suggestion at lineup proceedings," but that "neither Congress nor the Federal authorites have seen fit to provide a solution."[295] Title II provided that eyewitness testimony would be admissible as evidence in any criminal prosecution, regardless of whether the accused had an attorney present at the lineup.[296]

Thus, what appears to be constitutional interpretation by the courts is sometimes "a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress."[297] When the courts announce these rules, such as the exclusionary rule or the *Miranda* rule, they invite Congress to become involved in the continuing process of defining the content of individual liberties. Congress assumes a coordinate role. These rules lie "at the margin of constitutional liberties [and] should not be disruptive of a productive Court-Congress relationship."[298] Through this slow evolution of a constitutional common law, "[c]ongressional debate concerning the means of implementing new-found values may provide the Supreme Court with much-needed feedback as to the implications, and indeed the propriety, of its activism."[299]

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[282] *Id.* at 451.
[283] 18 U.S.C. § 3501(c) (1982).
[284] 384 U.S. 436 (1966).
[285] *Id.* at 467-79.
[286] *Id.* at 439-44.
[287] *Id.* at 445.
[288] *Id.* at 490.
[289] *Id.* at 463.
[290] *Id.* at 467.
[291] 18 U.S.C. § 3501(a) (1982).
[292] *Id.* § 3501(b).
[293] 388 U.S. 218 (1967).
[294] *Id.* at 239-42.
[295] *Id.* at 239.
[296] 18 U.S.C. § 3502.

No single institution, including the judiciary, has the final word on constitutional questions. All citizens have a responsibility to take a "hard look" at what judges decide. It is not true, as Justice Jackson once remarked, that Justices of the Supreme Court "are not final because we are infallible, but we are infallible only because we are final."[300] The Court is neither final nor infallible. Judicial decisions rest undisturbed only to the extent that Congress, the President, and the general public find the decisions convincing, reasonable, and acceptable.

The courts therefore find themselves engaged in what Alexander Bickel once called a "continuing colloquy"[301] with political institutions and society at large, a process in which constitutional principle is "evolved conversationally not perfected unilaterally."[302] It is this process of give and take and mutual respect that permits the unelected Court to function in a democratic society. John Agresto argues persuasively that "the more the Court can be treated as a partner in the politics of American life and not as a superior external agent, the fewer will be our doubts about its contributions and the greater should be our willingness to see it exercise its functions without misgivings."[303]

The ability of Congress to participate effectively in constitutional interpretation depends in part on the strength of its committee system, as Judge Mikva noted.[304] Responsible action also is more likely when Congress can resist precipitous action under the pressure of deadlines and public opinion. The historical record suggests that

> public excitement and party contentiousness may force measures of dubious constitutionality or wisdom onto the floor in the last hectic days of a pre-election session. At such times those seeking immediate political advantage may overleap all the hurdles which reason, experi-

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[297] Monaghan, *The Supreme Court 1975 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

[298] *Id.* at 34.

[299] *Id.* at 45; *see also* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975) (Congress should be able to draw the boundaries of civil rights protection, consistent with the Constitution.).

[300] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[301] A. BICKEL, THE LEAST DANGEROUS BRANCH 240, 244 (1962).

[302] *Id.* at 244.

[303] J. AGRESTO, *supra* note 36, at 152.

[304] Mikva, *supra* note 1, at 610.

> ence, and tradition have put up to assure deliberation. At such times, too, members may secure passage of measures which later prove highly questionable, without full awareness of their true character.[305]

Since legislators are subject to strong pressures and intense emotions, they might act on expediency "rather than take the long view."[306] Even when legislators want to uphold constitutional values, facts are not always presented in an orderly manner that permits rational and responsible analysis. The last days of a Congress are a period of frenzy, forcing legislators to race against the clock and make last-minute accommodations. The risk of error and miscalculation is high. Nevertheless, a winnowing process occurs throughout the session that discards many unconstitutional proposals. Congress needs to be judged not merely by the ill-considered bills it passes, but by those that never survive because of conscientious review.

Judges are assumed to have "the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."[307] Those presumed traits, however, do not give judges a superior edge in balancing constitutional values or investigating facts that underlie such constitutional provisions as the commerce clause.[308] Furthermore, judges cannot be expected to behave with model objectivity or wisdom. Justice Jackson once remarked that "[n]othing has more perplexed generations of conscientious judges than the search in juridical science, philosophy and practice for objective and impersonal criteria for solution of politico-legal questions put to our courts."[309]

No justification exists to defer automatically to the judiciary because of its technical skills and political independence. Each decision by a court is subject to scrutiny and rejection by private citizens and public officials. What is "final" at one stage of our political development may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of Supreme Court doctrines. Members of Congress have both the authority and the capability to participate constructively in constitutional interpretation. Their duty to support and defend the Constitution is not erased by doubts about personal or institutional competence. Much of constitutional law depends on factfinding and the balancing of competing values, areas in which Congress justifiably can claim substantial expertise.

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305. D. MORGAN, *supra* note 9, at 360.

306. A. BICKEL, *supra* note 301, at 25.

307. *Id.* at 25-26.

308. *See supra* notes 105-07 and accompanying text.

309. Jackson, *Maintaining Our Freedoms: The Role of the Judiciary*, 19 VIT. SPEECHES DAY 759, 759 (1953). The claims of impersonal judgments by members of the judiciary have been dissected in a number of studies. *See, e.g.*, Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571 (1948).

AMERICAN ENTERPRISE INSTITUTE
LEGISLATIVE ANALYSES

# Proposals for Line-Item Veto Authority

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*Balanced analyses of current proposals before the Congress, prepared with the help of specialists in law, economics, and government*

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# Proposals for Line-Item Veto Authority

1984

98th Congress
2d Session

American Enterprise Institute
for Public Policy Research
*Washington and London*

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# 1

# INTRODUCTION

On January 13, 1984, President Reagan announced that he would ask the Congress for line-item veto authority. This authority would allow him to veto individual items of appropriations measures that he must now approve or reject in their entirety. Governors in forty-three states now have this power to veto or, in some states, to reduce spending passed by the legislature, and President Reagan used the device during his tenure as governor of California. In his State of the Union address on January 25, 1984, the president called the line-item veto "a powerful tool against wasteful or extravagant spending" and voiced his support of a constitutional amendment to authorize such a veto.

Although the passage of legislation authorizing a line-item veto or the approval of a constitutional amendment granting the president this power is not considered likely, this device is important in the context of the continuing discussions on reducing the federal deficit. As one possible tool in the array of alternatives put forward to bring the budget process under control, the line-item veto faces strong opposition from congressional leaders of both parties.

This analysis will present background information on the line-item veto and will summarize arguments for and against its adoption.

# 2

# BACKGROUND

Before the American Revolution, the governors of the thirteen colonies could veto any legislation that came before them. Even if a piece of legislation was approved by the colonial governor, it was still subject to a veto by the king. A veto by either the governor or the king was absolute. It is understandable, therefore, that the framers of the Constitution were wary of the veto power and that its use was restricted by the possibility of a legislative override. This chapter presents background information on the use and purpose of the veto by the president and describes experience with the item veto in the states. It also describes the federal appropriations process, traces briefly the changes in that process, and describes the roles of the president and the Congress in determining levels of federal spending.

## THE EXECUTIVE VETO

Delegates to the Constitutional Convention in Philadelphia in 1787 concluded only reluctantly that the executive should possess a limited veto authority (the "qualified negative"). The veto was intended to give the president the means to protect his office from congressional inroads and as "security against the enaction of improper laws."[1] The president was limited to approval or rejection of a bill in its entirety, and the Congress could override a presidential veto by a two-thirds majority of both the Senate and the House of Representatives. These two limitations on the veto power were part of the "original understanding that the veto would be used only rarely, and certainly not as a means of systematic policy control over the legislative branch, on matters constitutionally indifferent and not menacing the President's independence."[2] The question of giving the executive the power to veto only portions of a bill—the line-item veto—was not discussed at the Constitutional Convention.

Despite the fears of the framers of the Constitution, experience shows that in general presidents have not exercised their veto power extensively. One source states that all the presidents through Lyndon Johnson in 1966 used the regular veto power only 2,238 times and that "the average percentage of legislation vetoed by fourteen presidents from 1889 to 1968 was 2.5."[3] The veto has been used more frequently during the twentieth century, but even the presidents who exercised this power most heavily vetoed only a small percentage of the bills submitted to them. Table 1 summarizes the use of the veto by the seven most recent presidents.

The use of the veto by state governors varies widely, and a recent nationwide

TABLE 1

PRESIDENTIAL VETOES, 1952–1983

| | | *Vetoes*[a] | | *Overrides* | |
|---|---|---|---|---|---|
| *President* | *Bills Passed* | Number | As percentage of bills passed | Number | As percentage of regular vetoes |
| Eisenhower | 3,724 | 73 | 2.0 | 2 | 2.7 |
| Kennedy | 1,093 | 12 | 1.1 | 0 | 0 |
| Johnson | 1,959 | 16 | 0.8 | 0 | 0 |
| Nixon | 1,698 | 24 | 1.4 | 5[b] | 20.8 |
| Ford | 923 | 43 | 4.7 | 12[c] | 25.5 |
| Carter | 1,275 | 13 | 1.0 | 2 | 15.4 |
| Reagan[d] | 707 | 15 | 2.1 | 3 | 20.0 |

a. This does not include pocket vetoes, since pocket vetoes are not subject to congressional override.

b. President Nixon exercised the pocket veto nineteen times. Although these vetoes were not subject to congressional override, two of the Nixon pocket vetoes were overruled by the courts. They are not included in these figures.

c. In a dispute with the Congress, four pocket vetoes by President Ford were found to be subject to congressional veto procedures. All four vetoes were overridden. These four vetoes are not included in the number-of-vetoes column. They are included in computing overrides.

d. Data for President Reagan include vetoes through the first session of the Ninety-eighth Congress (December 1983).

SOURCES: Bills passed: *Congressional Quarterly Almanac*, annual issues, 1953–1983; vetoes: Executive Clerk's Office, the White House.

accounting is not available.[4] Although governors veto bills more frequently on average than does the president, the percentage of bills vetoed is still relatively low.[5]

The executive veto is a potent policy tool when seen in the context of how many vetoes are overridden by the legislatures, however. In the states, where a vote ranging from a simple majority of those elected (five states) to two-thirds of those elected (twenty-nine states)[6] is required to override a governor's veto, an override is rare. According to Frank W. Prescott's 1947 data, only 22 of 1,253 vetoes were overridden in that year. In some states, the veto is almost absolute. The presidential veto is also relatively immune to congressional reversal. From 1945 to 1970, only 16 of 493 vetoes were overridden.[7] As table 1 shows, recent presidents have faced stronger opposition to their vetoes.

## LINE-ITEM VETO AUTHORITY IN THE STATES

Forty-three states have authorized a line-item veto for the state executive. Georgia and Texas were the first two states to incorporate the item veto in their constitutions, and "since the Civil War, with a single exception, every new state admitted to the Union and many of the older states have granted their governors this power."[8]

In eleven states line-item veto authority has been expanded to allow the governor to reduce as well as delete items in appropriations bills.[9] Four states allow the governor to recommend amendments to legislative bills. In the states of Washington and South Carolina the governor is empowered to veto items in any bill submitted to him, not just appropriations bills.[10] Among the states that do not authorize the line-item veto, the governor of West Virginia may not veto the budget bill, and the governor of North Carolina has no veto power at all. In Hawaii the governor may reduce only items in appropriations for the executive branch. He cannot reduce or veto items in the legislative or judicial budgets, but he can veto the entire budget.

Provisions for legislative override of a line-item veto also vary among states. Thirty-eight states require a two-thirds or a three-fifths majority, while a few states require a majority of those elected.[11]

In some states where the governor has a very strong role in spending decisions and the legislature has limited power to change the budget, the budget process has reduced the use of the veto.[12] In Nebraska the legislature may not appropriate funds in excess of the governor's budget request unless by a three-fifths vote, and a majority vote is required to reject or decrease such items. In New York the legislature may reduce or delete items or add separate items of expenditure in the governor's budget but may not increase item appropriations above his recommendations. In Maryland the legislature may decrease but not increase budget items, except appropriations for the legislative or judicial branches.

## LINE-ITEM VETO AUTHORITY FOR THE FEDERAL EXECUTIVE

Proposals to grant the president line-item veto power have been regularly offered in the Congress. In his statement on a bill (S.J.Res. 26) introduced during the Ninety-eighth Congress proposing a constitutional amendment granting line-item veto authority, Sen. Alan Dixon (D-Ill.) noted that over 140 line-item veto proposals had been introduced in Congress.[13] Sen. Harry F. Byrd (D-Va.) stated at a 1954 hearing that the item veto "has been under consideration at various times for a hundred years. It has been recommended by Presidents Grant, Hayes, Arthur, Wilson, and Roosevelt."[14]

In 1861 the Constitution of the Confederate States granted the Confederate president line-item veto authority over appropriations, but the veto was never exercised. Since that time, forty-three states have adopted some form of the line-item veto as part of their state constitutions.

The line-item veto has received support from most recent presidents. One source notes that "every President with one exception during the twentieth century that has expressed himself on the question has requested the item veto."[15]

President Reagan has voiced support for an item veto, but the Reagan administration has not yet submitted its own legislative proposal to authorize an item veto or formally endorsed any of the measures introduced thus far in the Ninety-eighth Congress.

## THE APPROPRIATIONS PROCESS

The appropriations committees of the House and the Senate consider and report bills that authorize federal agencies to incur obligations that will result in immediate or future outlays. In considering appropriation levels, the appropriations committees take into account the president's budget requests and the appropriation ceilings set in the program authorization bills. Program authorization bills are considered and reported by the standing committees of Congress. Appropriations—also called budget authority—are usually less than the ceilings set in authorization bills, although they can be for the full amount authorized.

Appropriations for a fiscal year are contained in thirteen separate bills.

*Regular Appropriations Bills for Departments and Agencies*

Agriculture
Commerce, Justice, State, the judiciary, and related agencies
Defense
District of Columbia
Energy and water development
Foreign operations
Housing and Urban Development/independent agencies
Interior
Labor/Health and Human Services/Education
Legislative branch
Military construction
Transportation
Treasury/Postal Service

Source: *Congressional Quarterly Almanac 1981* (Washington, D.C.: Congressional Quarterly, 1982), p. 244.

The House acts first on these bills, which are then subject to Senate action and presidential approval. If some of the bills are not passed by the beginning of the fiscal year, unfunded programs and agencies are funded in a continuing resolution. The continuing resolution sets overall funding levels for some specified time period that can vary from a few days to an entire fiscal year. Funding may be set at the previous year's level (the "current rate"), at the level set in the House bill (if the Senate has not acted), or at the lower of the House or the Senate bill (if no conference agreement has been reached). Although funding for some programs may be for a specific dollar amount, funding for most agencies and departments in a continuing resolution is set at one of the three general levels mentioned above.

After submitting his budget requests to the Congress, the president has fulfilled his formal role in the appropriations process. Although he may attempt to influence Congress through informal channels—discussions with appropriations subcommittee leaders, for example—his legal authority over the process is limited to approving or rejecting the final bills passed by the legislature. The appropriations bills, as listed above, contain detailed funding for programs in the department or agency. These "line items" would be subject to presidential approval or disapproval under the pending item veto proposals. If funding is contained in an omnibus continuing resolution, however, spending for individual proposals is not generally itemized. Items funded in a lump sum in a continuing resolution would not be vulnerable to the proposed item veto without clear language voicing this intention.

Large parts of the federal budget are not subject to the annual appropriations process. Authority for payment of interest on the national debt and social security benefits is established in permanent law. Outlays for entitlement programs, while nominally subject to appropriations, are determined by benefit levels and eligibility criteria in current law, and appropriation levels for entitlement programs cannot be reduced without legislative changes in one of these two determinants. Appropriations for a given year often include outlays for contracts concluded in previous years over which the Congress has no discretionary control. Estimates of the proportion of the federal budget subject to the direct control of the annual appropriations process range from 5 to 25 percent.[16]

**Changes in the Budget/Appropriations Process.** Beginning in the 1950s Congress became increasingly paralyzed by the budget process. The paralysis peaked between 1972 and 1974 when not one appropriation measure was enacted on time.[17] In response to this growing loss of control and to related concerns raised by the Watergate period, Congress enacted the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344). The 1974 budget act moved the start of the federal fiscal year from July 1 to October 1, giving legislators an additional three months to complete action on spending bills. It also reformed the budget mechanism into a two-step process: a first budget resolution that sets nonbinding estimates on overall spending and a second budget resolution that establishes binding totals for the fiscal year. The second budget resolution puts a ceiling on overall spending—spending that in earlier years had been dealt with in separate appropriations bills, with little control over overall totals. Action on appropriations cannot begin until after passage of the first budget resolution. Spending in the individual bills is tailored to meet specifications in the first resolution. A "reconciliation" process was also added to accommodate changing priorities by forcing congressional committees to reduce spending or raise taxes in programs under their jurisdictions. The binding totals set in the second budget resolution can be exceeded only by the passage of a third budget resolution.

Other changes implemented in 1974 restrict the president's ability to impound funds authorized by the Congress. The new impoundment procedures allow the president either to defer or to rescind budget authority, subject to congressional review and reversal. Budget deferrals—actions to delay expenditures—may continue in effect unless disapproved by either house of Congress.[18]

Rescissions—the cancellation of congressionally authorized funds—must be approved by the Congress within forty-five days of notification or the funds must be released. The president must send a special message to Congress notifying the members that he intends to defer or rescind funds.

Although intended to eliminate political abuse of impoundment, where a president could cut funds to impose his legislative priorities on an unwilling Congress, the impoundment procedures of the 1974 budget act have substantially limited the exercise of presidential discretion in program spending. The impact of the 1974 law is still being evaluated, but the act seems to have had little lasting effect on improving the timely completion of appropriations bills or on reducing overall spending levels.

# 3

# PENDING PROPOSALS

Although fourteen bills and joint resolutions (as of early March 1984) authorizing a line-item veto have been introduced in the Ninety-eighth Congress, the proposals can be summarized briefly in two general categories. One set of proposals would authorize an item veto of appropriation items only. The second group would authorize a veto of both appropriation items and legislative riders on appropriations bills. Table 2 summarizes the main features of the fourteen proposals introduced thus far.

## BILLS AND RESOLUTIONS AUTHORIZING A LINE-ITEM VETO OF APPROPRIATIONS

Nine bills and resolutions introduced in the Ninety-eighth Congress would authorize a presidential line-item veto of appropriations items. The bills and resolutions were introduced by Rep. Henry J. Hyde (R-Ill.), Rep. Douglas K. Bereuter (R-Nebr.), Rep. Gerald B. Solomon (R-N.Y.), Rep. George W. Gekas (R-Pa.), Rep. Bill Green (R-N.Y.), Rep. Jerry M. Patterson (D-Calif.), Sen. Alan J. Dixon, and Sen. Mack Mattingly (R-Ga.). The seven resolutions would amend the Constitution to provide the line-item veto authority: H.J.Res. 391 (Representative Hyde), S.J.Res. 26 (Senator Dixon), S.J.Res. 178 (Senator Mattingly), H.J.Res. 464 (Representative Solomon), H.J.Res. 448 (Representative Bereuter), H.J.Res. 399 (Representative Gekas), and H.J.Res. 436 (Representative Green). The Mattingly bill (S. 1921) and the Patterson bill (H.R. 4774) would provide line-item veto authority by an act of Congress. None of these bills or resolutions allows a veto of legislative riders. All except the Solomon and Patterson proposals restrict the line-item veto to appropriations for executive branch agencies; the president would not be authorized to veto items in appropriation bills for the legislative branch or the judicial branch.

Senator Dixon's resolution and Representative Gekas's resolution would allow Congress to override a line-item veto by a simple majority. The others would require a two-thirds majority for override. The Dixon, Bereuter, and Gekas resolutions would also allow the president to reduce items in appropriations bills.

The Solomon resolution (H.J.Res. 464) is unique in that it would prohibit the use of the line-item veto on any item of appropriations for the national defense. The resolution introduced by Representative Green would authorize either house of Congress to approve or disapprove executive actions, without presentment to

TABLE 2

Proposals Introduced in the Ninety-eighth Congress to Grant the President Line-Item Veto Authority

| *Bill or Resolution Number and Sponsor* | *Line-Item Veto of Appropriations Only* | *Authority to Reduce Appropriations* | *Line-Item Veto of Appropriations and Legislative Riders* | *No Line-Item Veto Authority over Appropriations for Legislative Branch or Judicial Branch* |
|---|---|---|---|---|
| H.J.Res. 10 (Bennett) | — | — | x | — |
| H.J.Res. 52 (Archer) | — | — | x | — |
| H.J.Res. 357 (Kemp) | — | — | x | — |
| H.J.Res. 391 (Hyde) | x | — | — | x |
| H.J.Res. 399[a] (Gekas) | x | x | — | x |
| H.J.Res. 404 (Archer) | — | — | x | x |
| H.J.Res. 436[b] (Green) | x | — | — | x |
| H.J.Res. 448 (Bereuter) | x | x | — | x |
| H.J.Res. 464 (Solomon) | x[c] | — | — | — |
| H.R. 470[d] (Archer) | — | — | x | — |
| H.R. 4774[d] (Patterson) | x | — | — | — |
| S.J.Res. 26[a] (Dixon) | x | x | — | x |
| S.J.Res. 178 (Mattingly) | x | — | — | x |
| S. 1921[d] (Mattingly) | x | — | — | x |

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a. Would allow a congressional override of a presidential line-item veto by a simple majority rather than a constitutional majority.

b. Would authorize a legislative veto.

c. Would prohibit exercise of the line-item veto on national defense bills.

d. Would authorize the line-item veto by act of Congress rather than by amendment of the Constitution.

the president. This provision would reestablish the legislative veto, which was ruled unconstitutional in the *Chadha* case.

The Patterson bill (H.R. 4774) would grant the president the authority to rescind items of appropriations or to line-item veto such items. Before rescinding funds, the president would be required to send a report to both houses of Congress. The report would identify the item to be rescinded; explain why it should be rescinded; estimate the fiscal, economic, and budgetary impact of the proposed rescission; and explain the circumstances affecting the decision to rescind funds. The rescission would become effective unless Congress passed legislation disapproving the rescission. The authority would expire one year from the date of enactment.

## BILLS AND RESOLUTIONS AUTHORIZING A LINE-ITEM VETO OF APPROPRIATIONS AND LEGISLATIVE RIDERS

Five bills and resolutions introduced in the Ninety-eighth Congress would authorize a line-item veto for the president that would allow him to veto both appropriations items and legislative riders. The resolutions were introduced by Rep. Charles E. Bennett (D-Fla.), Rep. Bill Archer (R-Tex.), and Rep. Jack F. Kemp (R-N.Y.). The Kemp resolution (H.J.Res. 357), the Bennett resolution (H.J.Res. 10), and the two Archer resolutions (H.J.Res. 404 and H.J.Res. 52) would amend the Constitution to authorize the line-item veto. The bill introduced by Representative Archer (H.R. 470) would grant the authority by an act of Congress. All the proposals would allow Congress to override a veto by a two-thirds majority.

# 4

# Issues and Arguments

Arguments for and against the adoption of the line-item veto can be divided roughly into two categories: issues relating to the balance of power between the executive branch and the legislative branch and arguments on the efficacy of the line-item veto as a way of reducing deficits.

## Issues Relating to the Separation of Powers

The system of checks and balances delineated in the Constitution is sometimes described as "delicate." The degree of tension between the Congress and the executive branch is nowhere more evident than in the area of spending policy. How does the congressional power over the purse strings affect presidential prerogatives in the operation of executive branch agencies and programs? Conve[illegible]ly, how do presidential policy decisions infringe legislative responsibility for spending? Would line-item veto authority enhance the powers of the executive at the expense of the legislature?

**Presidential Power.** Proponents of the item veto claim that the power of the president to veto appropriations bills has been seriously eroded. Congressional handling of the appropriations process has limited presidential veto power in two ways: (1) the inclusion of legislative riders in a funding measure forces the president to accept a bill with objectionable features or to reject the bill in its entirety, thus jeopardizing the funding of vital programs; and (2) the practice of passing appropriations very late in the session forces the president to accept a measure or to risk shutting down essential functions. In addition, the thirteen regular appropriations bills fund several agencies or departments in one bill, making it impossible for the president to pinpoint spending he would prefer to cut (see list of appropriations bills).

An article by Henry Hazlitt in the *Wall Street Journal* charges that Congress "has perfected the device of throwing in pork-barrel, log-rolling and other vote-buying appropriations with those that the president needs to carry on the government."[19] According to Russell M. Ross, professor of political science at the University of Iowa, and Fred Schwengel, president of the U.S. Capitol Historical Society,

> the President, in fact, has little or no choice. Appropriation bills almost invariably are composed of items necessary for the public welfare as

> well as items not necessarily in the national interest. The President may "choose" to accept the bill in its entirety thus approving the undesirable and unnecessary items and the wasteful expenditures of funds, and assenting to any attached legislative "riders," or he may reject the bill in its entirety thus risking delay if not discontinuance of necessary functions and work on needed projects.[20]

Ross and Schwengel conclude that the item veto authority would "do little more than restore to the President his rightful power and take from Congress powers which it has usurped for itself."[21]

Opponents of the item veto contend that the present executive veto is a potent tool of public policy. Sen. Mark Hatfield (R-Oreg.) notes that "the President has been very effective in using his current veto power in getting Congress to keep down the size of our appropriations bills."[22] The use of the veto or the threat of a veto is sufficient means of expressing displeasure with congressional measures. To give the president the power to veto specific budget items, according to Sen. Carl Levin (D-Mich.), would free the president from "the need to compromise as he participates in the budget making process" and would given him "a preeminent, if not unassailable, position in the budget process."[23] Rep. Mickey Edwards (R-Okla.) asserts that the line-item veto "would concentrate substantial new powers in that most concentrated of power bases, the presidency."[24] Representative Edwards notes that this "acquiescence to the imperial presidency . . . threatens the foundation of our form of government—a system carefully designed to balance powers and limit central authority."[25]

Proponents of the item veto deny that it would enhance presidential power to any appreciable extent. They cite an article by the late Sen. Arthur H. Vandenberg (R-Mich.) in which he summarizes this view:

> The item veto does not give the President one single, additional, affirmative power. He cannot start anything as a result. He can only stop something long enough to focus the attention of the country on it, and long enough to force two-thirds of the House and the Senate to agree to it in spite of him and his reasons, if they should persist in their adverse judgments. Its only harm, if any, would lie in the temporary delay while Congress and the country stop, look, and listen. I have never known any lives to be lost by obedience to this familiar injunction. There will be no governmental casualties under similar circumstances.[26]

If the item veto did increase presidential power vis-à-vis Congress, this, it is claimed, would still not offset the serious erosion of presidential power that has taken place in recent decades.

Opponents also note that, if the line-item veto were authorized, the president alone would decide which pork-barrel projects would be funded. He could delete funding for projects in some districts, while allowing funding for similar projects in other districts to remain. The potential for rewarding or punishing states or members of Congress through the appropriations process could lead to political blackmail. Sen. Russell Long (D-La.) noted that the president could hold individual line items hostage and put members of Congress "in a position that if they did not vote with the President on other matters totally irrelevant to what is within that appropriation bill, they would then see their projects vetoed as individual line items."[27] Opponents are particularly concerned in the case of a president in his second term who is no longer subject to the decision of the electorate. A second-term president with a lopsided majority in the Congress could be almost immune to a veto override. Those who favor the line-item veto respond that members of Congress must justify their actions to the voters at regular intervals and that reelection prospects would be severely damaged by behavior that the voters perceive as irresponsible and not in the national interest.

The appropriations process, say advocates of the line-item veto, is out of control in the Congress, and the existing presidential veto power can do little to restrain spending. Funding for activities of the federal government is contained in thirteen annual appropriations bills. Since passage of the 1974 budget reform act, Congress has been unable to clear all thirteen bills before the start of the fiscal year. (In 1978 all thirteen bills were cleared before adjournment.) Departments and agencies whose appropriations have not been passed are funded in an omnibus bill, and the bill is usually passed at the last possible moment. The president is therefore reluctant to veto the measure—even if it contains funding that substantially exceeds budget estimates—because of the costly shutdown of government operations that would occur if he fails to approve it. A line-item veto, claim proponents, would discourage last-minute passage of controversial appropriations in an omnibus bill because the president would have the freedom to delete or reduce objectionable items and avoid a total stoppage in government affairs.

Opponents, on the other hand, argue that the president has indeed been willing to use his veto power over late-session appropriations and that Congress, albeit reluctantly, has reworked the measures to gain his approval. In 1982 President Reagan vetoed two omnibus measures, even though the vetoes caused a temporary shutdown of some government offices. The problem is not that the present veto power of the executive is inadequate. Rather, say these opponents, the appropriations bills have become so massive that the existing congressional appropriations process is unable to handle them in the course of a single congressional session. As Sen. Pete Domenici (R-N.Mex.) has noted, "the time is here for us to take a real look at being more orderly and reasonable with our processes so we do not need this kind of amendment working its way through the U.S. Senate and through the Congress. I am sure it would not have any support but for the fact that we have let our process get out of control."[28]

**Congressional Power.** Opponents of the line-item veto contend that this veto would tip the scales of the balance of power strongly toward the executive, essentially granting him legislative power and increasing his political leverage. Supporters counter that the existence of the line-item veto would force Congress to make more responsible spending decisions and that any use of the line-item veto undertaken for purely political reasons would be rare and, in any case, could be overridden by the Congress.

Article I of the Constitution gives Congress the responsibility to make decisions on public spending. The line-item veto, say opponents, would weaken this power substantially, because the president would in effect have the final say on spending. In addition to the danger of losing its power over the purse strings, members of Congress could avoid public responsibility for the loss of spending for projects favored by their constituents. Thus, members of Congress could trade votes (logrolling) to fund district projects not in the public interest that do, however, benefit their constituents (pork-barrel items). If the president were to veto the item, the congressman could honestly tell his constituents that he had fought for its inclusion. Thus, as Sen. Lawton Chiles (D-Fla.) commented, Congress could "have it both ways":

> We can be for a project that looks mighty good back home, knowing all the while that someone in OMB will flag it and tell the President, "You better veto that." We will not have to worry. The President will take the heat. We will get the credit and the chance to answer mail both ways. A Member can say, "I added the money for this valuable project I knew you wanted, but I am sorry the President vetoed it."[29]

Supporters of the line-item veto argue that Congress has failed to hold the line on spending and that the line-item veto would be an incentive to adopt responsible spending programs. Sen. Robert Dole (R-Kans.) commented in this regard: "We have to find some way to restrain spending. If we are not willing to do it, we should be willing to give this authority to the President, whoever he might be, Democrat or Republican, if he is willing to take the heat."[30]

Those who favor the line-item veto reject the notion that the item veto could be used as a political weapon and believe that Congress can and should use its override power if such an abuse occurs. Senator Dixon cited the experience in the states to support his argument in favor of the line-item veto: "Frankly, most times when the chief executive vetoes in these States, it sticks. When he or she is wrong, it does not. . . . I would argue that when the President vetoes a line item and public opinion supports overriding, we would override."[31] Supporters also note that the veto power is rarely exercised. One source calculates that the average percentage of legislation vetoed between 1889 and 1968 was only 2.5 percent and concludes that the "full veto is not . . . a power used routinely."[32] An older study of the executive veto in the states found that amounts removed from state budgets by item veto were small, "averaging from one to three per cent of total state budgets."[33]

Opponents of the line-item veto respond that although the present veto power is rarely exercised, congressional override of a presidential veto practically never occurs. Since an override requires a two-thirds majority, whereas passage of legislation is by simple majority, Congress can seldom muster the additional votes needed to override. Ross and Schwengel note that only ninety-two presidential vetoes were overridden between 1787 and 1980.[34] Charles L. Black, Jr., Sterling Professor of Law at Yale Law School, estimates that only 5 percent of all bills vetoed through the administration of Franklin Roosevelt were overridden.[35] Proponents respond that in recent years Congress has been able to override presidential vetoes quite regularly (see table 1).

The Congress is charged in the Constitution with setting funding levels for government programs. If the president is able to delete program funding and close down programs to which he objects, he would be exercising a legislative power, say those who oppose the line-item veto. A report from the House Budget Committee notes: "Extending the President's veto power beyond what the Constitution now provides would allow the President largely to substitute his judgment for that of a majority of the Congress on specific policy items."[36]

Proponents point out that if a line-item veto is sustained, the program lacks widespread popular support and should be scrapped. If the Congress feels strongly that the program is necessary and worthwhile, it will assert its will by overriding the veto. Proponents also note that both the House and the Senate have rules that legislation changing existing law shall not be attached to appropriations bills. If Congress, however, adhered to its own rules governing legislative riders, there would be no riders on appropriations that would be subject to presidential item vetoes. The "Christmas tree" spending bills sent to the president laden with special interest legislation, say proponents of the line-item veto, are fair game for a president bent on reducing spending. Five of the bills under consideration would allow the president to veto legislative riders in appropriations bills.

Small states, say opponents, would be particularly vulnerable to punitive use of the line-item veto. While the small states have an equal say in the Senate, a state with a single representative would have more difficulty gathering support for an override of a veto that adversely affected its population:

> It is inconceivable that two-thirds of the Members of both Houses would vote to override the veto of a small item for some post office in a community which to them is merely a point on the map in some State hundreds of miles away. Only on rare occasions has Congress chosen to override the President even when he has vetoed an entire bill of general interest to the country at large. To expect two-thirds of the Members of each House of Congress to take up their cudgels and fight for an appropriation of interest to only one small locality is to ignore facts in the great game of politics.[37]

Proponents deny that this would be the case, citing again the force of public opinion that would be brought to bear to salvage worthwhile items. The president could not afford to alienate too many members of Congress without jeopardizing his position in veto confrontations and on legislation that he is requesting.

## EFFICACY AND EFFICIENCY

In addition to constitutional questions on the effect of the line-item veto on the relative powers of Congress and the president, another significant issue in the discussion of the line-item veto is its practical implementation. Can the line-item veto reduce federal deficit spending? Would it make the congressional appropriations process more efficient?

**Reducing the Deficit.** Proponents and opponents of the line-item veto differ in their assessments of the efficacy of this device in reducing the federal deficit.

Opponents claim that the line-item veto would have little effect on federal spending. The "controllable" costs of operating the federal government are a smaller proportion of the federal budget today than they were ten years ago, and the proportion of these costs to total outlays continues to shrink. The costs of entitlement programs—social security, Medicaid, welfare benefits, and retirement programs—cannot be controlled without legislative changes in eligibility or benefit levels. The cost of these programs is determined by the size of the eligible population and the level of benefits, and it cannot be reduced arbitrarily. A report prepared for the House Budget Committee estimates that the following amounts would be exempt from the line-item veto in fiscal year 1985 under preliminary Congressional Budget Office (CBO) projections:[38]

| | |
|---|---|
| Social security | $189 billion |
| Net interest payments | 116 billion |
| Medicare and Medicaid | 98 billion |
| Other mandatory programs | 92 billion |
| Prior year commitments: | |
| Defense | 110 billion |
| Domestic | 78 billion |
| Total | $683 billion |

Of the current estimated budget of $925 billion, an additional $155 billion in defense spending is unlikely to be vetoed, leaving only $86 billion—approximately 9 percent of FY 1985 spending—in nondefense discretionary spending as the likely target for cuts.[39]

Sen. Lawton Chiles notes that only 18 percent of the budget is in appropriations: "The appropriations are not the sources of money trouble. The problem is in the entitlement programs. The problem is in the interest we are paying on the debt, and in taxes or tax expenditures."[40] A *Washington Post* article puts the percentage of the budget subject to the line-item veto at between 12 and 15 percent. In addition to excluding the entitlement programs and interest on the national debt, the veto is unlikely to be used to cut defense spending.[41] In the same article, Reagan administration officials noted, however, "that a future president might well use the line-item veto to reverse Reagan increases in the defense sector."[42] This possibility concerns Rep. Mickey Edwards, who notes that a Democratic president

> would not be likely to veto an entire defense appropriations bill, and would thus be somewhat bound by congressional determination to proceed with systems such as the B-1, [but] the power to accept most of the appropriation but single out specific items for veto could . . . eliminate defense items crucial to the national security.[43]

The bill introduced by Representative Solomon would address such concerns by prohibiting a line-item veto of funds for national defense.

Data released by the CBO show that net interest in fiscal year 1984 will total $105 billion: "Of total fiscal 1984 budget outlays, CBO estimated non-defense discretionary spending—that is, spending for all programs other than defense—will make up only slightly over 18 percent. If defense is added, total discretionary spending amounts to 45.7 percent of fiscal 1984 outlays."[44]

Sen. Don Nickles (R-Okla.) disagrees that the Congress has little power over national spending:

> In fiscal year 1983, the President sent to the Congress requests for appropriations of $497.9 billion, the Congress approved $510.8 billion, an increase of $12.9 billion. If the President had the power to reject portions of these appropriations bills sent him, we may have seen the fiscal year 1983 deficit reduced by a substantial amount.[45]

Proponents also note that the president, unlike the Congress, is elected by a national constituency to pursue the national interest. Given the line-item veto, the president could cut the "costly and/or questionable projects" that members of Congress fund "by inserting a well-placed but little-noticed phrase or two in an appropriations bill to shield the project from budget cuts."[46] The president is in a position to weigh the importance of regional or local initiatives against the overriding national interest.

Advocates of the line-item veto point to the experience of the states to support their claims that the line-item veto can have an important impact on spending. This impact can be indirect, in that "the governor's influence and the ever-present threat or fear of a veto has caused many bills to be withheld, withdrawn, modified or to die in committee."[47] The line-item veto can also have a direct effect on state spending. In a 1954 Senate hearing on the item veto, Rep. Charles E. Bennett listed responses from governors who had been asked about savings achieved through the veto. The amounts vetoed varied from under $100,000 to over $51 million. Representative Bennett concluded that "if it saved money for the States it can save money for the Federal Government. It may not save billions; but it will save millions, and I am ready to start right there."[48] More recent data from the states show that governors have vetoed or reduced appropriations to achieve substantial savings. In Illinois in 1983, Governor Thompson vetoed $174.7 million and reduced appropriations by an additional $26 million. Of fifty-eight departments and agencies, twenty-four had their budgets vetoed or cut.[49] In 1983 the governor of California achieved savings of approximately $1.2 billion—cuts equal to more than 4 percent of the state budget.[50] Governor Thornburg of Pennsylvania used the line-item veto five times in 1983 to reduce spending by $1.15 billion (12 percent of the budget).[51]

Opponents of the veto claim that comparing the state experience with the federal situation is invalid. They note that state legislatures meet less often than the Congress. As a result, the executive budget is considerably more important as a spending plan, and the role of the legislature has declined commensurately. Moreover, most states require a balanced budget, and experience has shown that "piecemeal reductions [are] inadequate as over-all devices of control."[52] Critics also note that the item veto "was adopted to prevent unconstitutional or improper appropriations, rather than to provide a systematic check upon excess legislative grants of money. . . . More modern weapons are demanded to meet irresponsible mass attacks upon the public treasury."[53] Those who oppose the line-item veto point out that although the dollar amounts vetoed by the state governors may sound impressive, the actual percentage cuts are quite small. The amount vetoed by the governor of Illinois totaled just under 2 percent of appropriations, and cuts in Michigan were less than 0.0001 percent of the budget. Opponents also note that drastic cuts such as those undertaken in Pennsylvania are unlikely to be sustained by the legislature. Over $1 billion of the funds vetoed by Governor Thornburg was restored by the legislature. Sen. Alan Dixon responds that the line-item veto in Illinois "saves billions and billions of dollars. On the basis of what it did in Illinois last year translated to what it could do for the federal budget, the savings to taxpayers this year, if the president had line-item veto power, would be between $25 billion and $30 billion."[54]

**Efficiency in the Appropriations Process.** Most members of Congress admit that the process of setting spending levels for the federal government is in disarray. Some blame the inefficiency on the increasing complexity of federal programs and the inability of a single member of Congress to grasp the intricacies of all the spending bills. Others note that the legislators have brought the problem on themselves by needlessly complicating spending bills with unrelated legislative riders. Proponents of the line-item veto argue that it can bring order to the appropriations process by simplifying spending bills and discouraging nongermane riders. Opponents respond that the inadequacies of the existing system should not be improved upon by involving the executive branch in the processes of the legislature.

The item veto, say its proponents, would pressure the Congress to focus on spending levels in appropriations bills rather than on legislative riders. The elimination of riders on appropriations bills would be a step toward fiscal responsibility in the Congress and "would enable Congress to enact the corrective legislation so vital to regaining control of Federal spending."[55] Senator Mattingly notes that

Congress has been unsuccessful in reforming its budget process and that the line-item veto would be "far more effective in dealing with the budget nightmare than the current ineffective tools available to Congress."[56] Sen. Robert Dole agrees that the item veto would "reduce the incentive to attach riders to appropriations bills, and increase the efficiency of Congressional procedures."[57] He notes that "the frequent impasses over supplemental appropriations and continuing resolutions could be avoided with a line item veto in effect."[58]

Sen. John Stennis (D-Miss.), an opponent of the line-item veto, disagrees that this device could streamline the appropriations process: "There is nothing you can do that will really tear up and cast asunder the impact, the influence, and the power of the appropriations committees than to pass an amendment like this line item veto and let it become law."[59] Sen. Bennett Johnston (D-La.) argues that the veto "would almost make Congress superfluous when it came to appropriation matters."[60]

The report of the President's Private Sector Survey on Cost Control, *The Cost of Congressional Encroachment*, came out strongly in favor of item veto authority, calling it "a constructive element that could lead to a significant reduction in management ineffectiveness." The report notes that

> in the 1960s it was possible to tolerate whatever inefficiency . . . legislative riders and similar actions introduced into administrative matters simply because the resulting budget deficits averaged a "manageable" $6 billion a year. Now, however, the country is facing deficits approaching $200 billion annually. In the equivalent circumstances, a private sector enterprise would take drastic steps to tighten its belt, eliminating all systematic inefficiencies in its authorization, management and operating practices. . . . Implementing an item veto is one such decisive action that the Federal Government needs to take in order to mitigate an inherent weakness in the political process—and to enable the Federal Government to optimize the use of the nation's human and capital resources.[61]

## OTHER ISSUES

In addition to arguments about the effect of the line-item veto on the balance of power and about the possible gains in efficiency, several related issues are often raised in the debate over the item veto.

**The Need for a Constitutional Amendment.** Several of the legislative proposals for the line-item veto are present in two types of bills: one type would set in motion the process for approving an amendment to the Constitution; the second type would authorize the line-item veto legislatively. Most proponents agree that a constitutional amendment is necessary to expand the veto power granted to the president in Article 1, Section 7, of the Constitution. But those who favor statutory enactment of an item veto note that such legislation could be passed more quickly, thus hastening the day when the item veto could be put into effect.

Disagreement between those who favor statutory enactment of an item veto and those who favor a constitutional amendment centers on the ambiguity of the term "bill" as used in the Constitution. Jay Shampansky, in a study for the Congressional Research Service, summarizes what is considered the most extreme interpretation of the term. Some assert

> that when the framers of the Constitution used the term "bill," they meant a measure relating to only one individual item. Thus, the argument goes, the framers intended for the President to be able to review each provision of law passed by the Congress, and the President's power to do so should not be restricted merely by Congress' practice of packaging in one bill numerous unrelated items.[62]

Using this definition, some would claim that the president is already empowered to veto appropriations items.

Proponents of the statutory enactment approach argue that Congress can stipulate that each item in appropriations bills be considered a separate bill for purposes of presidential vetoes. Those who support this view note that "if a statute were enacted and the experience of the Congress and the country under that statute was unsatisfactory or if you had Presidents who abused that power and that authority, Congress then could by very simple means or by the ordinary means repeal the statute."[63]

Most proponents of the line-item veto reject the idea that Congress can legislate this authority:

> The power of Congress to grant the President the privilege of vetoing items of an appropriation bill is certainly nowhere expressed in the Constitution, nor is it necessary and proper for carrying into execution the clearly expressed limited veto power granted the President in the Constitution. . . . Congress manifestly is not permitted to abdicate or to transfer its essential legislative functions nor is it permitted to give to the President an unlimited authority to determine policy.[64]

They agree that there is nothing in the debates at the Constitutional Convention to support the view that the term "bill" can be construed to relate to only one item: "Whatever may have been the framers' unarticulated and perhaps unexamined assumptions, they can be reconstructed at present only by speculation. In the absence of any clear intent to convey a more limited meaning by the use of the word 'bill,' the issue of its original content must remain open."[65] Since the meaning of "bill" is not specified in the Constitution, Congress, it is argued, cannot legally define this term in its rules of proceedings.[66] Amending the Constitution, although a more lengthy and cumbersome procedure, is the only legally acceptable means of granting the president line-item veto authority.

**Comparison with State Experience.** Some critics of the line-item veto contend that successful state experience with the veto is not a valid guide for the national government. Most states have a constitutional or statutory limitation on state deficits. In thirty-three states the executive budget must balance expenditures with revenues; in thirty-seven states and the District of Columbia legislative appropriations must balance these two sides of the budget ledger.[67] In addition, eighteen states have adopted tax and expenditure limitations that use a formula "tying costs to ability of . . . citizens to pay taxes."[68] The item veto, it is claimed, is not an important tool of fiscal management in the states where budget deficits are prohibited.

Supporters of the line-item veto respond that, even within a balanced budget, the threat of an item veto can enforce spending priorities by focusing public attention on specific issues.

The most frequently heard argument used to discount the comparison between state and federal budgets is that "the federal budget is fundamentally unlike state budgets. It is fundamentally less susceptible to control by vetoes, item or otherwise."[69] In attacking this view of the federal budget, a *Wall Street Journal* editorial proposes that Congress act to change the relevant laws if it is serious about restraining spending:

> The "current law" that makes spending "nondiscretionary" or "uncontrollable" was, of course, not a law handed down on Mount Sinai. Congress passed these laws, and the Constitution says Congress can change them. It is both repulsive and immoral for the legislators of this or any government to say that programs they enacted into law *must* spend hundreds of billions of the public's money every year because programs are "uncontrollable." This is the public morality of Marie Antoinette.[70]

**Line-Item Veto Authority to Reduce Appropriations.** Several of the bills under consideration would authorize the president to veto or reduce appropriations.

Those who favor giving the president the authority to reduce appropriations claim that this power is necessary to a meaningful exercise of the line-item veto:

> In the Federal Government it is rare that Congress adds a separate item of appropriation; rather the normal practice is to increase the amount of an appropriation instead of adding a new appropriation. The increase may not even require any change in the language of the bill. This type of situation . . . coupled with the practice of lumping expenditures for a number of functions into one appropriation suggests the need for an item veto authority which permits the President to reduce, as well as delete, specific appropriation items.[71]

Reducing lump-sum appropriations across the board would force Congress to reconsider each program separately on its own merits. Congress could then choose to accept an across-the-board cut in all programs in the appropriation or to delete some individual programs and restore full funding to the others. In either case, say proponents, legislators would have to state their spending priorities publicly and accept responsibility for their choices.

Opponents of line-item reduction authority assert that this device would severely limit legislative control of program funding, in fact granting the president the power to reduce program activities at will. Since executive agencies generally are able to "reprogram" an appropriation by shifting funds among programs, allowing the president to reduce funds would enhance executive branch control of program priorities to an unacceptable level. In a Congressional Research Service analysis of S.J.Res. 26, legislative attorney Thomas J. Ricola notes that

> if the President were to propose a ten percent reduction in [a lump-sum appropriation] it is not clear how Congress would become aware how he proposes to implement such a reduction. . . . Before voting to override, they might wish to know whether he proposes to implement the reduction across the board . . . or, alternatively, completely eliminating some projects to achieve the full savings while leaving others unaffected.
>
> In considering S.J.Res. 26, proponents may wish to focus on the precise scope of power they are granting to the President.[72]

Proponents respond that agencies would still be responsive to the preferences of congressional committees that review their activities, since to ignore these preferences would risk retribution in the form of funding cuts or other sanctions. Opponents counter that with the loss of legislative veto power under the *Chadha* decision, reduction authority is yet another intrusion into congressional programming prerogatives.

**Item Veto of Legislative Riders.** Several proposals under consideration would grant the president authority to veto riders. They are H.J.Res. 10 (Bennett); H.J.Res. 357 (Kemp); and H.J.Res. 52, H.J.Res. 404, and H.R. 470 (Archer). Although both houses of Congress have a rule prohibiting legislative riders on spending bills, the practice of attaching such—often nongermane—provisions to appropriations continues. The use of the legislative rider did not come into vogue until the Civil War, and it may be assumed that this device was not discussed by the framers of the Constitution.

Proponents of proposals to allow the federal executive to item-veto riders assert that the lack of this power restricts executive authority:

> The device of the rider, if deemed not subject to separate veto, is thus an impairment of the independence of the Executive in the performance of its duties as laid down in the Constitution—an independence preserved at great cost in the past. One need not take sides in the debate whether either presidential or congressional power is too weak, vis-à-vis that of the other, in order to view with concern the impact of riders on the veto power provided in the Constitution.[73]

Adding nongermane riders to vital legislation circumvents the executive veto and can subordinate the national interest to political considerations. Thus, for example, legislative riders on appropriations bills have been used to restrict the expenditure of funds for politically controversial activities. In 1973, President

Nixon vetoed a supplemental appropriations bill containing a provision barring the use of funds in the bill for bombing Cambodia. In 1974, President Ford vetoed two appropriations bills with riders that would have restricted U.S. military assistance to Turkey. In both instances the Congress sought to impose its foreign policy priorities through the "backdoor" device of a legislative rider. Proponents of the item veto of legislative riders assert that such riders infringe on executive policy making and undermine the president's authority in the international arena.

Opponents respond that the rider is a legitimate legislative device and one necessary to maintaining a balance of power between the legislative and executive branches:

> A piece of legislation is a product of a complex interaction between individual legislators, interest groups, the public, and the President himself. The individual sections of any bill, including the riders, are reflective of the inevitable compromise that occurs within Congress on any important matter. Some provisions are, in effect, passed by Congress only on the condition that other provisions, sometimes in the form of riders, are included in the bill. To allow the President then to veto the rider separately would be to confer a new and different type of power on the executive. A majority of Congress may very well oppose a bill in the form in which it is finally approved if the President exercised such a power. Thus the will of one man could conceivably cause the enactment of legislation opposed by a majority of Congress.[74]

The power of the presidency, say these observers, has increased significantly during the twentieth century. If the balance between the aggregate powers of the three branches of government is to be maintained, "it is clear that the branch which least needs fortification through the grant of additional power is the executive."[75]

Supporters of an item veto of legislative riders also point out that riders—since they are added to a bill after it has emerged from committee—often evade the authority of congressional committees. Rep. Charles E. Bennett spoke to this issue during hearings on the item veto held in 1957:

> The practice of legislative riders is undesirable not only because it gives undue protection to the bad rider; but it is also undesirable because it forestalls consideration by a legislative committee. . . . It seems to me that this blow at legislative riders, although incidental to the objective of allowing item vetoes, is actually extremely important and a great improvement over the present situation.[76]

Opponents respond that riders are necessary to express concerns supported by a majority of the Congress that would not otherwise survive committee consideration.

**Alternatives to the Line-Item Veto.** In the face of rising deficits, some opponents of the line-item veto support other means of controlling federal spending. Alternatives include strengthened impoundment authority for the president, a strong executive budget system, and a balanced budget amendment to the Constitution.

*Presidential impoundment authority.* Senate Majority Leader Howard Baker, Jr., suggested that "Congress might 'do more good' by passing legislation to expand the president's power to rescind appropriations."[77] Congress restricted presidential impoundment authority in 1974 in response to President Nixon's use of these powers to impound funds on policy grounds. Proponents of rescission note that it could be enacted relatively quickly and that the precedent of earlier impoundment authority ensures that there would be no question of its constitutionality.[78] Amending the Constitution to authorize a line-item veto, they claim, "would probably not provide any authority for dealing with near-term government spending."[79] Opponents of expanding rescission authority claim that statutory enactment of this authority, unlike constitutional authorization of a line-item veto, would be subject to congressional amendment or repeal. The president's power to shape the budget could be—and has been—withdrawn if the Congress decided to exert its will in the budget process.

Critics of rescission also note that savings achieved under this authority have been minor.[80] Although President Ford, for example, requested rescissions totaling $7.4 billion, Congress approved only $1.2 billion. President Carter's rescission requests during his four years in office amounted to slightly over $6.7 billion, of which Congress approved only $2.6 billion. In both cases the rescissions approved were well under 1 percent of budget authority. Sen. William Proxmire (D-Wis.) rejects the idea that rescissions are an important budget-cutting tool: "So the argument is that we can go ahead and solve this problem with rescissions and deferrals as we have them on the books. It seems to me, on the basis of experience, we just cannot achieve the kind of savings that we can with the veto proposal."[81] Proponents of rescission respond that a president willing to exercise his power to defer or rescind spending can achieve savings equal to what could be saved with a line-item veto.

A House Budget Committee report found that in his first two years in office, "President Reagan used his rescission authority extensively during which time the Congress allowed more than three-quarters of his rescission requests, resulting in more than $20 billion lower spending."[82] In the past two years, however, President Reagan has not used this device as vigorously, proposing rescissions totaling only $1.5 billion in FY 1983 and $388 million in his latest budget submission. The report concludes that the president "already has powers sufficient to achieve that which he seeks through the line-item veto" if he is willing to exercise this authority.[83]

Sen. William L. Armstrong (R-Colo.) supports changes in current rescission procedures that would enhance presidential power to cut spending. Under the Armstrong proposal, rescissions would become effective unless disapproved by the House and the Senate within forty-five days. This procedure would "require Congress to act on rescissions to defeat them, rather than let inaction defeat them, as is now the case."[84]

*Strong executive budget system.* In an analysis of the item veto for the Congressional Research Service, Ronald C. Moe, an analyst in American national government, summarizes features of a strong executive budget system:

> Included in such a system might be features like requiring a special majority vote in the legislative body to introduce items not recommended or to vote sums for particular purposes larger than those recommended in the executive's budget plan; greater use of lump sum appropriations; increase the ability of the executive to hold spending of funds not needed; and strict use by legislatures of the rule against attaching nongermane legislative riders to appropriation bills.[85]

Asserting the role of the executive in the budget process has been a dominant feature of state budgeting over the past half-century, says Robert P. Kerker, chief of administrative management of the New York State Division of the Budget. Kerker asserts that "the essential goals of the reformers who plumped for the adoption of the executive budget—coherence, responsibility, accountability—will remain intact as the bedrock of budgetary systems."[86] Frank W. Prescott of the University of Chattanooga agrees that the rise of the executive budget movement has been an important vehicle for overall control of the state budget process, relegating the item veto to the status of a "somewhat rusty 'gun behind the door,' to be aimed at an occasional predatory prowler."[87] Those who are less sanguine about the benefits of a comprehensive overhaul of the budget system to strengthen the power of the executive note that the Congress traditionally has been reluctant to cede more budget-making authority to the president and that passage of legislation to increase presidential prerogatives is unlikely. They also note that the Constitution grants the power to make decisions on expenditures to Congress.

In the states, critics claim, legislatures are in session for only a few weeks of the year. In this situation it is only natural that the governor has more control over the budget process. The state example of executive budget making is not applicable to the federal system, where Congress is intimately involved in spending policy on a year-round basis. Critics also note that in some cases the state legislatures have become powerless in the face of a strong executive budget process. Senator Johnston asserts that "the Governor of Louisiana is both the legislature and the executive. He wields the power completely." Senator Johnston objects to giving the president of the United States the same degree of power over the national budget that the state governors have over their state budgets because (1) no one person has the comprehensive knowledge that would justify such authority, (2) power would in effect be delegated to bureaucrats, and (3) power would reside in those unaccountable either to the people or to the Congress.[88]

*Balanced budget amendment.* In 1982 the Senate passed a balanced budget amendment that would have required Congress to pass a balanced budget and keep outlays within that budget. The proposal would have required a three-fifths majority to run a deficit. Although the 1982 legislation failed to pass in the House, bills to amend the Constitution to require a balanced federal budget are a regular feature of the debate on the budget process. Bills to require a balanced budget have been introduced in every Congress since the Eighty-ninth.[89]

Proponents of a balanced budget amendment contend it would be a more effective weapon against runaway federal spending than the line-item veto. Vast government spending has necessitated increases in the money supply, which in turn fuel the fires of inflation. Beneficiaries of government spending have a strong incentive to see that these programs are continued. Arthur Burns, the former head of the Federal Reserve System, stated:

> We may, in fact, be entering an era in which governmental processes are overwhelmed by the naked demands of increasingly well-organized and effective interest groups. It is this concern that has led me to look with favor on even peremptory devices for offsetting the existing bias toward larger Federal spending and borrowing. . . . A constitutional requirement of a balanced budget would indeed be drastic therapy; but this or some other decisive measure may well be needed to assure the American people that our governmental bias toward spending and borrowing is being effectively offset and that they therefore can look forward once again to a dollar of stable purchasing power.[90]

Opponents contend that a balanced budget requirement would not constrain government spending, since Congress could balance the budget by raising taxes. They also argue that unavoidable economic fluctuations might cause a budget deficit despite the best efforts of Congress or government fiscal planners. Opponents note that the mandate for a balanced budget could be undermined by increasing expenditures for off-budget entities or shifting expenditures to the private sector under programs such as a national health plan.

Advocates respond that Congress would be more reluctant to raise taxes than it is to use deficit financing. Interest groups would resist a wholesale shift to the private sector of the costs of programs now under federal purview.

Some critics contend that the balanced budget amendment is too inflexible to permit proper management of the economy. The federal government would be unable to respond to economic recession with appropriate countercyclical programs. Proponents argue that a balanced budget need not be insensitive to changing economic conditions and that devices can be incorporated into an amendment to respond to fiscal crises.

Those who oppose a balanced budget amendment are concerned about the effect of such an amendment on spending priorities. Shrinking federal resources would pose a real dilemma as to where spending can be cut, and many costs would have to be shifted to state and local governments. Advocates contend that costs of government should be shifted to governments close to the people and that the federal government must make difficult choices in its efforts to control spending.

# NOTES TO TEXT

1. *The Federalist Papers*, no. 73 (New York: New American Library of World Literature, 1961), p. 443.

2. Charles L. Black, Jr., "Some Thoughts on the Veto," *Law and Contemporary Problems*, vol. 6, no. 2 (Spring 1976), p. 90.

3. William J. Keefe and Morris S. Ogul, *The American Legislative Process: Congress and the States* (Englewood Cliffs, N.J.: Prentice-Hall, 1981), p. 384.

4. For a summary of the use of the gubernatorial veto for selected years 1937–1947, see Frank W. Prescott, "The Executive Veto in American States," *Western Political Quarterly* (March 1950), pp. 98–112.

5. Ibid., p. 103. Prescott cites a range for the year 1947 of zero to 26.4 percent, with an average of 5.0 percent for all states and territories.

6. Council of State Governments, *The Book of the States 1982-1983* (Lexington, Kentucky: Council of State Governments, 1982), table 16, pp. 212–13.

7. Keefe and Ogul, *The American Legislative Process*, table 11.3, p. 403.

8. Vernon L. Wilkinson, "Observations on the Item Veto," August 13, 1936, Mimeographed, p. 4.

9. States allowing the governor to reduce appropriation items are Alaska, California, Illinois, Hawaii, Massachusetts, Missouri, New Jersey, North Dakota, Pennsylvania, Tennessee, and West Virginia.

10. Ronald C. Moe, "The Item Veto" (Washington, D.C.: Congressional Research Service, December 13, 1973, Mimeographed), p. 3.

11. Council of State Governments, *Book of the States*, table 16, pp. 212–13.

12. State information in this paragraph is taken from ibid., p. 277.

13. *Congressional Record*, vol. 129 (February 1, 1983), p. S837.

14. U.S. Congress, Senate, Committee on the Judiciary, *Item Veto*, 83d Congress, 2d session, May 13, 1954, p. 3 (hereafter *1954 Hearings*).

15. Russell M. Ross and Fred Schwengel, "An Item Veto for the President?" *Presidential Studies Quarterly*, vol. 12 (Winter 1982), p. 66.

16. Lower estimates assume that no legislative changes will be made in eligibility criteria or benefit levels in programs where payments are "automatic." Higher estimates assume some legislative changes.

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19. Henry Hazlitt, "Line-Item Leash on Runaway Spending," September 9, 1983.

20. Ross and Schwengel, "An Item Veto for the President?" p. 77.

21. Ibid.

22. *Congressional Record,* vol. 129 (October 29, 1983), p. S14942.

23. Ibid., p. S14945.

24. Mickey Edwards, "A Conservative's Case against the Line Item Veto," *Washington Post,* February 8, 1984.

25. Ibid.

26. Quoted in *1954 Hearings,* p. 6.

27. *Congressional Record,* vol. 129 (October 29, 1983), p. S14948.

28. Ibid.

29. Ibid., p. S14941.

30. Ibid., p. S14940.

31. Ibid., p. S14936.

32. Keefe and Ogul, *The American Legislative Process,* pp. 384–85.

33. Prescott, "The Executive Veto in American States," p. 108.

34. Ross and Schwengel, "An Item Veto for the President?" note 39, p. 79.

35. Black, "Some Thoughts on the Veto," p. 92. Black omits from his compilation President Andrew Johnson's extensive veto confrontation with the Congress.

36. U.S. Congress, House, Committee on the Budget, *The Line-Item Veto: An Appraisal,* January 1984, p. 4.

37. Wilkinson, "Observations on the Item Veto," p. 30. See also the discussion in the Senate, *Congressional Record,* vol. 129 (October 29, 1983), pp. S14941–48.

38. House, Committee on the Budget, *The Line-Item Veto,* p. 3.

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43. Edwards, "A Conservative's Case against the Line Item Veto."

44. Dale Tate, "Reagan's Deficit-Cutting Bid May Spotlight Line-Item Veto," *Congressional Quarterly,* vol. 130 (January 21, 1984), p. 114.

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50. California Department of Finance.

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52. Frank W. Prescott, "The Executive Veto in Southern States," *Journal of Politics* (November 1948), p. 673.

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87. Prescott, "The Executive Veto in Southern States," p. 673.

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# LINE-ITEM VETO TO PROVIDE THAT EACH ITEM OF ANY GENERAL OR SPECIAL APPROPRIATION BILL AND ANY BILL OR JOINT RESOLUTION MAKING SUPPLEMENTAL, DEFICIENCY, OR CONTINUING APPROPRIATIONS THAT IS AGREED TO BY BOTH HOUSES OF THE CONGRESS IN THE SAME FORM SHALL BE ENROLLED AS A SEPARATE BILL OR JOINT RESOLUTION FOR PRESENTATION TO THE PRESIDENT

---

MONDAY, MAY 20, 1985

U.S. SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
*Washington, DC.*

The committee met, pursuant to call, at 2:01 p.m. in room 301 of the Russell Senate Office Building, Hon. Charles McC. Mathias, Jr. (chairman) presiding.

Present: Senators Mathias, Ford, and Inouye.

Staff present: John B. Childers, staff director; William McW. Cochrane, minority staff director; Gerald W. Siegel, minority chief counsel; John K. Swearingen, director, Technical Services; Ann B. Cook, chief clerk; Peggy Parrish, professional staff member (minority); Carole J. Blessington, assistant chief clerk; Gerald Gereau, chief investigator; Dennis G. Doherty, auditor; Beth Cady, professional staff member; Waitus A. Dowless, professional staff member; Anthony L. Harvey, senior systems analyst (Technical Services).

## OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR., CHAIRMAN, COMMITTEE ON RULES AND ADMINISTRATION

The CHAIRMAN. The committee will come to order. We wanted today to continue the discussion of the proposed line-item veto which is embodied in Senate bill 43.

It is a bill to provide that each item of any general or special appropriation bill and any bill or joint resolution making supplemental, deficiency, or continuing appropriations that is agreed to by both Houses of the Congress in the same form shall be enrolled as a separate bill or joint resolution for presentation to the President.

Our witnesses this afternoon will be two of the three members of the panel of experts that testified at the first hearing, Dr. Norman Ornstein and Dr. Louis Fisher. They were so thoughtful and provocative at the first session, and this prompted the continuation of the hearings.

The third of the witnesses, Dr. Allen Schick, is unable to be here for the happy reason that he is attending his son's graduation from college, but he has given us a prepared statement, which I will summarize very briefly before we call on the witnesses.

He says that S. 43 flies in the face of Congress' longstanding tradition of appropriating funds in large budget items. He says, and I quote: "Although the Federal budget is divided into more than 1,100 accounts, the 50 largest accounts add up to more than 80 percent of total outlays." Thus he would conclude that "current practices offer meager support for the proposition that the item veto would enable the President to pluck high spending items from appropriations bills."

Second, he concludes that line-item veto in practice might lead to more rather than less spending. Over the past decade there has been a steady increase in the number of general provisions attached to appropriations bills in an effort to limit the use of appropriated funds by executive agencies. Dr. Schick says:

> It is ironic that these general provisions rather than spending levels might turn out to be the principal targets of the item veto.

Third, if enacted, the line-item veto would simply strengthen the hand of the President over the will of the Congress. Dr. Schick says:

> When Congress and the President disagreed as to spending priorities, the President would have a better chance of imposing his preferences.

I would add that S. 43 would also strengthen the House of Representatives at the expense of the Senate, since traditionally—and some would say constitutionally as well—appropriations measures originate in the House. Consequently, the House would determine how these measures would be broken apart into items. That would mean not only greater power to the President, but more power for the Speaker, all resulting in diminished authority in the Senate.

Dr. Schick concludes with the observation—and again I quote directly:

> . . . the item veto is a political obstacle to effective budget control. Concentrating on discrete items might have been appropriate a century ago when spending was modest and most funds were allocated for the continuing operations of Government. In the present situation, however, budget control depends on reaching agreement as to total spending and on a package of program and expenditure policies consistent with that total. The recent Senate budget package was passed only because many Members were willing to subordinate their preferences with respect to individual items to an overall Congressional budget policy.

Well, with those observations, we will, without objection, include all of Dr. Schick's statement as part of the record.

[Dr. Schick's additional prepared statement follows:].

American Enterprise Institute for Public Policy Research,
*Washington, DC, May 20, 1985.*

Hon. Charles McC. Mathias, Jr.,
*Chairman, Senate Committee on Rules and Administration, Russell Senate Office Building, Washington, DC.*

Dear Senator Mathias: During the Committee's hearing on the item veto held on May 14, some interest was expressed in the rescission process as a means of controlling expenditures. One advantage of the rescission process is that it can reach below the full account and withhold funds from particular projects or activities, in contrast to an item veto which applies only to the entire account.

Another possible advantage is that unlike an item veto which would enable the President to prevail if supported by one-third of the House and Senate, a rescission would require a majority vote to support the President's position.

At the hearing, I noted that under the present rescission rules, funds proposed for rescission must be released (and spent) even in the absence of a majority vote upon expiration of 45 days of "continuous session." I further noted that this problem has recently arisen with respect to noncontroversial rescissions, with the result that funds have sometimes been either unnecessarily spent or the rescission rules have been violated.

In view of my inability to attend the resumed session of the hearings, it might be useful to provide some concrete data on this problem for the record.

The inadequacy of the current rescission process has recently been evidenced by congressional response to presidential rescissions proposed pursuant to the Deficit Reduction Act of 1984. That Act established expenditure savings targets in 6 management categories. On February 6, 1985, the President submitted 226 rescission proposals totaling $372 million to Congress. However, Congress did not act on any of these proposals—despite the fact that they were made in response to its directive in the Deficit Reduction Act—by the time the 45-day period expired.

At least two steps have been taken thus far to compensate for the failure of the rescission process to produce the intended repeal of budget authority. First, the Senate Appropriations Committee reported S. 469, the rescission bill, with an amendment that would extend the impoundment of the funds withheld pursuant to the Deficit Reduction Act until July 1, 1985. According to the Appropriations Committee Report (S. Rept. 99-7), this delay "will enable the Committee to fully review the administration's rescission proposal and to identify further reductions necessary to approach the goals . . . of the Defict Reduction Act."

The Senate has not yet acted on S. 469, as reported. Technically, therefore, the funds withheld to accomplish the objectives of the Deficit Reduction Act should be released.

The second step, also in response to the expiration of the 45-day period, has been to notify affected agencies of the intention of the Appropriations Committee to rescind the funds later this year. Thus, in a letter to the head of an executive agency dated March 7, 1985, Senator Paul Laxalt, Chairman and Senator Ernest F. Hollings, Ranking Minority Member of the Commerce, Justice, State, and Judiciary Appropriations Subcommittee, wrote as follows:

> As you are aware, last year Congress mandated OMB to recommend proposed savings from vehicle, public affairs, consultants, travel, and public relations and printing costs from a number of agencies in Section 2901 of the Reconciliation Act. Pursuant to law, OMB has forwarded a list of proposed rescissions to Congress.
>
> We are writing to notify you that we propose to enact all the 2901 rescissions identified for agencies under the jurisdiction of the Commerce, Justice, State Subcommittee on a general Supplemental bill after this year. We intend to enact these savings even if the time limits for rescissions or deferrals have expired. We are notifying you of our intent so you can properly budget for your activities.
>
> If you believe that you can achieve the same level of savings in another area of your budget and you want to waive the specific reductions suggested by OMB, the Subcommittee would be willing to entertain a request to that effect. Unless notified, we will assume you will take the reductions in the functions proposed by OMB. Please contact the Subcommittee staff to work out any details of such a request. The staff is also willing to answer any other questions you may have.
>
> This policy does not include any program rescissions, which the Committee will review on a case-by-case basis.

The deficiency that has necessitated this action occurs frequently, both because rescission is a complicated legislative process (each proposed rescission is referred, under a unanimous consent agreement entered into in 1975, to at least three Senate committees), and because the Appropriations Committee which has the lead jurisdiction often is so fully involved in the annual appropriations process that it cannot divert attention to proposed rescissions.

I would suggest that if your Committee has an interest in strengthening the rescission process as a more effective and better balanced means of curtailing expenditures and the deficit than the item veto, it might examine the rescission process or direct the proposed Select Committee on the Two-Year Budget to undertake this task.

I would be pleased to assist your Committee as you deem appropriate and would be willing to suggest means of strengthening the rescission process.

Sincerely,

ALLEN SCHICK.

The CHAIRMAN. Senator Ford.

Senator FORD. Mr. Chairman, I have no statement. I am very pleased that our two witnesses are here today. They were, as you say, very provocative and interesting and gave an insight into some of the problems that might develop if S. 43 becomes law.

I think Dr. Schick makes a couple of very good points, as you relate those from his statement—more power to the speaker, more power to the President, and we have subordinated our individual items for an overall package. Then we separate those out into individual items, and it appears that they would then give us some cause for concern.

I am very interested in listening to the two witnesses and appreciate your taking the time to have this additional hour.

The CHAIRMAN. Senator Inouye.

Senator INOUYE. No, Mr. Chairman.

The CHAIRMAN. Gentlemen.

## TESTIMONY OF LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, AND NORMAN ORNSTEIN, AMERICAN ENTERPRISE INSTITUTE

Dr. FISHER. I had something to add to the discussion of last week. Proponents of the item veto argue that it would restore the President's veto power to its original concept. The argument is made that over the years, the President, faced with omnibus appropriations bills or omnibus legislation, does not have the veto power that the framers intended.

One point I would make is that I think it's a misconception that in the early years legislation and appropriations bills were more itemized than they are today. I think you will find in the early years appropriations were made for lump-sum purposes; the President didn't have any stronger use of the veto power then.

So we have had omnibus bills from the start.

And, second, even though omnibus bills like the continuing resolution of last year or some of the other large reconciliation bills are certainly of a new variety, to keep the balance between the executive branch and the legislative branch in mind, it is also true that the President's legislative powers in the 20th century are far stronger than the framers would have intended. I think as recently as a century ago it would have been heresy for a President to submit a draft bill; that was a legislative prerogative. Well, clearly the 20th century has seen the President much more active on legislative powers, on drafting bills, on having White House liaison, and departmental lobbyists.

So it's true that the omnibus bills of recent years do undercut the President's veto power, and yet, on the other hand, the President's legislative powers are dramatically stronger than they were two centuries ago.

Dr. ORNSTEIN. Let me just flesh out a couple of the points that we made last week as well. I spent some time over this weekend thinking about what direction we were heading in, and also mulling over the testimony of Senator Mattingly and Senator Evans and thinking about what the proponents of this bill have been saying.

It seems to me, first of all—and as I suggested last week—this bill and the approach of the item veto reflect a fundamental error in the underlying premise, which is that a President is more provident than Congress, that Presidents are more careful with public funds than Congress is. And one of the reasons that the notion of the line-item veto has taken hold, as it has in different places, is that it plays into cultural attributes of Americans that we hold dear—and we should—and they have been good for this country: and that is a distrust of politics and politicians—to a point, at least, we hold them dear. But it certainly plays into the prejudices that suggest that Congress is just trying to spend as much money as it possibly can and can't wait to get out there and open up the public coffers.

It seems to me that everybody who believes the opposite—and the evidence strongly suggests the opposite—has to step forward and counter that view forcefully, because the plain fact is that any honest review of the historical record suggests that Congress has been more careful over the near 200-year history of this country with public money than Presidents have, and that Presidents who have a shorter-term perspective basically than the institution of Congress, who want to do things, who get credit in the history books the more aggressive they are, the more innovative they are, end up on balance wanting to spend more money. Congress has spent a great deal of its time and attention over its history finding institutional ways to overcome whatever biases exist in a democratic system that lead it to spend more money, through institutional reforms ranging from the creation of the Appropriations Committee to attempts in the past at budget committees, as we saw right after the war, to various ways of limiting spending—that it is simply wrong to suggest that if we give Presidents more power it will lead to less spending.

I think that beyond the specifics of the issue of the line-item veto, we have to find ways to get out the notion that it is not Congress that is the villain here, or the only villain, at least—and it seems to me that if we talk about the period of the last 20 years or so, or the period of the last 5 years or so, where clearly deficits have been more consistent than we saw during the course of our history—and you look back over the 180 years before this, and what you have is Congress struggling, whenever we have built up large amounts of debt, and almost always building up a large amount of debt came with wars that drove us very deeply into debt. If you look at the United States right up through the 1950's in fact, and if you discount the Civil War and the two world wars, we had a budget that was this close to being in balance over 170 years, as Congress followed years of debt built up from wars with years of surplus to erase the national debt. If you look at the period of the last 20 to 30 years, it's been a little bit different. But even so, at worst, it seems to me, Congress is an unindicted coconspirator with Presidents ranging from Lyndon Johnson right on up through Ronald Reagan in creating an increase in debt—and clearly the period of the last 5 years has been a different one.

It seems to me that that is something that we ought to underscore here, as debate carries forward. This isn't just a question of the narrow technicalities of how you would implement S. 43 or who would have the right—the enrolling clerk in the House or the Secretary of the Senate, or whatever—to make decisions. It is also a question of what premises we start with in ways of controlling Federal spending, and whether we have in fact a built-in institutional bias that requires a legislative solution now that will, it seems to me, inevitably lead, if it were implemented, to a constitutional amendment down the road.

My second point: It is an error to believe that you can do this for 2 years and come up with some firm and precise accounting 2 years later that shows how much money the line-item veto has saved or not saved, and then say, all right, this didn't work, let's trying something else; or this is wonderful, let's go forward.

It's going to be very murky, and the proponents, if they manage to get the camel's nose under the tent, will come forward forcefully and insist that it be reinstated for the following Congress and it will lead with momentum toward a constitutional amendment that I believe would in a fundamentally flawed way result in a flow of power to the President away from the Congress in a way that would not meet with the positive judgment of the Founding Fathers.

And, finally, let me just say in our opening here, Allen Schick stimulated me as well to think over the weekend about rescissions and the rescission authority, and to read a little bit about it and to think about how the rescission power has been used.

I think that one can make a very effective case that the rescission power, as was built into the Budget and Impoundment Control Act of 1974, is probably a more effective line-item veto than S. 43 could ever be, because of some of the problems that we suggested last week, getting at individual items.

The degree to which Presidents have used the rescission authority during the 10 years of the Budget Act is a good indication of how serious the Presidents we have had since that time have been about holding back on Federal spending. It seems to me that with just a few exceptions in a couple of years, it has not been an overwhelming record.

Even if it is the case that it is more difficult to apply the rescission power, because Congress has to act in a direct and positive fashion to make it take effect, that it is erased with inaction, which is the norm in our legislature—if the President wants to make a political point in a serious way that he is the one that is trying to put the rein on Federal spending and Congress is trying to spend us into oblivion, the most effective serious way to deal with that is to use his rescission power in every instance that he thinks is necessary and then really put the blame directly on Congress if they don't follow through.

That is another fatal flaw, I think, in the premise here. But it also seems to me that if Congress decides it wants to move in a direction of strengthening the hand of the President or strengthening the institutional mechanism for cutting back on spending on individual items, the way to go about it is not through S. 43 but with reform of the rescission process, to make it more difficult perhaps for Congress to force that money to be spent.

We could even spend some time exploring ways that that could be done, although some of them, I think, are relatively obvious.

The **Chairman**. One obvious thing to do would be to say that in the rescission process you need a super majority of some kind.

Dr. **Ornstein**. Sure, or you could make rescissions like deferrals, where the burden is reversed, where in essence the money is not spent unless Congress takes an action; or you could make it in effect like a veto where you would force a vote within a 45-day period up or down, by making those votes privileged matters and finding ways and various mechanisms to prevent or at least minimize filibusters or to keep them from ever getting up on the agenda.

I think you could probably design in a variety of ways mechanisms that would make rescissions a more effective mechanism of partnership between the two institutions, and not misused.

Dr. **Fisher**. I am not sure about the partnership. There is only one major way you could change the rescission process. Currently you need the two Houses for support within the 45 days, so you are basically talking about a bill or joint resolution of approval. If one House doesn't act, then the proposed rescission is dead.

So the only way to change the process, particularly under the *Chadha* Supreme Court case, is a joint resolution of disapproval. You are talking about affecting executive-legislative relations, because you might have a situation where Congress has to act four times to implement its will; namely, Congress would pass an appropriations bill, it would be vetoed, and then Congress would act a second time to override, so the appropriations bill would be enacted.

Then the President sends up a rescission, and now Congress would need a joint resolution of disapproval, which it would pass—and that would be the third action. That would go back to the President since the joint resolution would be subject to veto, and you would need to override that.

It's a question of whether you want Congress acting four times to say how money should be spent.

I was here in the early seventies when the impoundment bill was being debated, and I remember, particularly on the Senate side, the concern that there is something demeaning to the institution of Congress to force it to act not just once or twice, but three times—and here we have four times.

We are talking about the ability of Congress to be able to decide priorities. Do we want Congress to act four times to finally have its way?

That would be the result of the joint resolution of disapproval.

The **Chairman**. Senator Inouye.

Senator **Inouye**. I regret I wasn't here for the first hearing—in the few minutes here I've learned a lot. I enjoyed your discussion on the premise that we should consider, but to get to the nuts and bolts—the chairman in his statement this afternoon said:

> The House of Representatives would determine how these measures would be broken apart into items, thereby giving the Speaker extra power.

Does this mean that the Congress can put all of DOD in one item, not separated—Army, Navy, Air Force? Just make it one item? So if the President vetoes, he has to veto the whole Defense Department?

Dr. **Fisher**. Well, the enrolling clerk under S. 43 would follow the structure of the appropriations bill, he would follow the unnumbered paragraphs where the dollars are and the numbered sections where usually your conditions are.

Now, under the present situation, under Defense you might end up with 100 or 150 items, but if S. 43 were passed you would have a new ball game, and——

Senator **Inouye**. You could put it in one?

Dr. **Fisher** [continuing]. You could. It's up to Congress to write the bill the way it wants.

Dr. **Ornstein**. You could do it in many more subtle and clever ways of in effect putting it into one, or removing items by putting them into report language, or finding ways to influence the way the enrolling clerk would end up characterizing the paragraphs.

Senator **Inouye**. The other constitutional question—I haven't researched this, and I should, I suppose. I have been on the Appropriations Committee now for about 16 years, and it has always bothered me that we have to wait for the House to act.

Do they have the constitutional power?

Dr. **Ornstein**. No; they certainly don't.

Senator **Inouye**. It's just on matters of taxation, isn't it?

Dr. **Ornstein**. Yes. It's custom.

Dr. **Fisher**. Only custom. The Senate in the early sixties did a print on whether the Senate could originate appropriations bills, and I have done that study myself. I think it's true that if the Senate wanted to there is nothing unconstitutional about originating appropriations bills.

If the Senate is going to act as an appellate body, I suspect it's nice to let the House bring the bills to it, and then amend it on the Senate side. In fact, as you know, in recent years the Senate has actually reported out a few appropriations bills because of delays on the House side.

Senator **Inouye**. But we had to wait.

Dr. **Fisher**. Pardon?

Senator **Inouye**. The committee had to wait. We reported out to the Senate, but the Senate held it up.

Dr. **Fisher**. Yes; you did.

Dr. **Ornstein**. That's strictly custom. I suspect, as Louis in an underlying way suggested, there have been many times when the Senate has found it useful to let this custom apply. One often can gain some leverage as an institution by waiting and then acting as a court of appeals, or using that leverage. But it doesn't always work that way.

Senator **Inouye**. You just made an interesting observation, that the rescission power really hasn't been employed by the President.

Have you made any studies as to how much has been involved in rescissions?

Dr. **Ornstein**. Yes; we have here—at AEI we put out a book every 2 years called Vital Statistics on Congress that tracks trends in different ways inside and around the institution. We have a section on budgeting that looks and it has through I think 1984 the rescission authority and how it's been used.

It's up and down, but we are not talking large amounts of money certainly.

Senator INOUYE. What was the amount last year?

Dr. FISHER. This goes, as Norm just said, through 1984—and we can give this to the committee for its use. Basically, on the rescission process, the first year of President Reagan enormous amounts were rescinded with almost 90-percent support from Congress; that is, fiscal 1981, $16.2 billion were proposed, and you actually rescinded $14.5 billion—90 percent.

The record the next year in 1982 is $9.4 billion proposed and about $6 billion rescinded—63 percent. Then it has dropped off in the 2 years after that, 1983 and 1984—only zero-percent support from Congress in 1983 and 9-percent support in 1984. You would have to look at each of those years to see the extent of comity and cooperation between the branches. You have to send up sums that have the possibility of being rescinded.

It may be the case in some years where congressional support was zero that it was not done with realistic possibilities—but that would take some feedback from the Appropriations Committee to see the nature and character of those rescissions the last couple of years.

Dr. ORNSTEIN. I find it ironic that really it's in years 1983 and 1984 that this became a major issue, where the executive branch and some in Congress began to push for line-item veto authority, and during those years the amount proposed dropped off to next to nothing—little more than $1.5 billion in 1983 and only $666 million out of a near trillion-dollar budget in 1984.

Senator INOUYE. Your argument is that if they wanted a line veto they could have done that through rescission.

Dr. ORNSTEIN. Yes; if this were a really serious effort to cut back on Federal spending, and if it were a really serious effort to suggest in a fundamental way that it is Congress' fault and not the President's, or not a joint effort, or not a difficulty that can't be dealt with in an institutional fashion, the way to do it is not to pick on something that isn't there and say if I only had this I could deal with the deficit.

The way to do it is to use the authority that is available to you. And use the rescission power to line-item veto all of those items that you would cut back individually if you had that authority, and then let Congress refuse to approve those, and go out there with a list and say: I did what I could, and they blocked me.

That clearly is not the case now. I don't think—I would hesitate to put this in starkly political or partisan terms, I don't think that that is the case at all. And I think there are a number of well-meaning people out there who really believe that the problem is fundamentally Congress, and that if we do give more authority to the President that that will deal with it. And they happen to be on both sides of the political aisle and probably span the ideological spectrum. I just happen to think they are wrong, and there is evidence to suggest that this is not the most serious effort that one could imagine to deal with Federal spending.

Senator INOUYE. Thank you.

Dr. **Ornstein**. I might add, Senator Inouye, since you weren't here last time, that it's my belief that if we had a line-item veto authority, it would lead to more spending, not less; that Presidents are action-oriented individuals, they have programs they want to pursue—whatever levers of power they have available to them, they are going to use to accomplish their major goals.

The line-item veto gives the President an enormous lever of power to use to convince individual Members of Congress, because it can get down to the individual level, to go along with him.

So the example that I have used in the past and used last week was the MX. I can imagine the President coming in and talking to recalcitrant Senators when he wants all of his MX's and saying do you want that dam in your district, your state, or you want the Chesapeake Bay cleaned up—you will vote for the MX. And the end result will be we get more MX missiles, more projects, more additional priorities, all of which would end up costing money.

Senator **Inouye**. Well, even without the line-item veto, it's been attempted right now.

Dr. **Ornstein**. It makes it much more efficient, that much more efficient.

There we are talking about items that involve relatively trivial amounts probably in the overall context of Federal spending but that have enormous impact for individuals, so you can use a relatively trivial amount of leverage to get the big buck items that Presidents tend to want.

Senator **Inouye**. I'm ready to vote.

The **Chairman**. So am I. [Laughter.]

Senator **Ford**. Do you want me to exercise my proxies, too.

The **Chairman**. Unless there are some further questions on rescission, I would like to reopen the question of constitutionality, because as I recall the discussion of the other day there was a question raised as to whether this procedure by which you would pass the whole bill collectively, and then divide it up into 100 or 1,000 or however many individual bills would be involved, would raise a question as to whether the enacting clause, which had been just collectively agreed on, could be applied separately to each of the individual bills, is that correct?

Dr. **Fisher**. I raised the question, because under the procedure of S. 43 the enrolling clerk would take the appropriations bill and take out, say, a paragraph with the dollar amount—and that couldn't go to the President by itself—so the enrolling clerk would have to add an enacting clause or a resolving clause, if it's a resolution; then there are other things in the United States Code to direct the enrolling clerk as to the design and format and style to make an appropriations bill, and then I suppose, although S. 43 doesn't say this, the enrolling clerk would probably have to put an H.R. number or an S. number.

And then the question is, is that particular bill, the way it had to be fashioned by the enrolling clerk, a bill that had passed the House and the Senate, which is required under article I of the Constitution.

The substance might have passed, implied action by the House and Senate, but did that particular bill pass the House and the Senate?

Dr. **Ornstein**. And the whole direction the Supreme Court has been moving in, with *Chadha* in particular, would suggest moving back to the fundamentals, not trying to find devices that go away from these fundamental questions.

So it raises certain serious questions about constitutionality.

Senator **Inouye**. Are we going to vote on this some day?

The **Chairman**. There are those who would like us to vote this afternoon on it, which is all right with me—if we can get a quorum.

But I hadn't really considered this particular problem, but it does seem to me to be a real one, because you would—let us say you took the item for lock No. whatever it is in Louisville, KY.

Senator **Ford**. No; I want the one down at Smithland.

The **Chairman**. All right, whichever one--it's your choice.

Senator **Ford**. It's removal of lock and dam 52 and 53 and make one, that's really what I want.

The **Chairman**. All right. Let's say you got that, and we excise that from the appropriations bill and that becomes a separate bill in itself. And clearly that would have been acted on by both Houses of the Congress in the same form.

But then you have to take the general enacting clause, which has also been acted on just once, and make that into a separate enacting clause, which is really constituting the enrolling clerks as being legislators, is it not?

Dr. **Ornstein**. It certainly is. And does give them—I mean, the constitutional question is a real one. It's also a question as to how much discretion would be allowed for those enrolling clerks.

The **Chairman**. We all know that we now have to invest the staff of the House with considerable authority, when we ask them to review the language of bills and make technical corrections and so forth and so on. And while I have confidence that this is not abused, the opportunity for abuse still certainly presents itself.

Dr. **Ornstein**. We do have, as we discussed last week—there are precedents, but it would seem to me that if the Supreme Court—and Lou is much more of an expert on this than I am—but as I look at it, as a layman, if the Supreme Court follows the logic of the *Chadha* decision, I don't see how they could view something like this as fitting within the constitutional framework of lawmaking, given the amount of authority that would be vested in nonelected individuals.

Dr. **Fisher**. There are already actions that the House and the Senate will deem to have taken place—and we mentioned the Gephardt rule where once you pass your budget resolution someone on the House side will go into the budget resolution and take out the public debt limit, pull it out, put it into a bill of joint resolution, and that bill of joint resolution would be "deemed" to have passed the House. The House never would have acted on it.

Occasionally in a continuing resolution, when you have a completed action, a matter reported from one committee or acted on one House would be deemed to have passed Congress.

There is a foundation there. This would just carry an additional step where something that actually had not been done by the House and not been done by the Senate will, under this, have been deemed to have been done by both.

Senator INOUYE. Interesting.

Senator FORD. Let me ask you this question. Have you all given any more thought to the relationship of a line-item veto under a balanced budget and an unbalanced budget?

We got into that just a little bit last time. But the Governors who have line-item veto have a line-item veto under a constitutional provision of a balanced budget. Now, that eliminates the political aspect of whether to get my vote to either leave in lock and dam at Smithland or take it out, you know—so I am sitting right up there like a sitting duck.

Your statements today indicate that the line-item veto increases spending. That flies in the face of the proponents of S. 43 who contend that it would cut back spending.

I thought Senator Hatfield made a very persuasive case here last time when he said that something the public generally did not understand is that Congress had sent the President less money than he had requested over the period of time he's been here; therefore we are giving a line-item veto to an individual to cut back on spending when actually we have reduced the spending request that he made to us.

That flies in the face of a line-item veto to cut back on spending. He cuts back wherever he wants to.

Am I kind of getting it all together some way or another?

Dr. FISHER. Yes; I thought the chart by Senator Hatfield made a very important point, because Norm has mentioned that the President does have rescission authority which he could use, and in the last few years has not used it very much. Of course, he could use his general veto power, which is an enormous weapon to force cuts in the bill-making stage, and that has not been used much.

Third, probably the greatest leverage on the size of the budget, partly because of what Senator Hatfield said, is the authority of the President—the responsibility of the President to submit the budget. Now, if it's true, as Senator Hatfield said, that Congress stays under the aggregates—if that is the pattern—even over the last 5 or 6 years, then in terms of aggregates on outlays and budget authority, the President, to the extent that he reduces the aggregates, Congress would still have a motivation probably to stay within—so the President, simply by submitting a budget and setting forth the totals and the aggregates, has tremendous impact on the size.

Now, I brought with me today, because of what you said, Senator Ford, on the relationship between item budget and a balanced budget—a section from the United States Code. Before it was recodified in 1982, the fiscal power section in the version of the United States Code dated 1976 had a provision going back to 1921, the Budget and Accounting Act. It's section 13 where it states that if—this is basically a section that says if the budget is going to be out of balance, then make recommendations to keep it within balance, including new taxes. The language reads:

> If the estimated receipts for the ensuing fiscal year contained in the budget, on the basis of the laws existing at the time the budget is transmitted, plus what you have in the Treasury at the end of the year, are less than the estimated expenditures contained in the budget, the President in the budget shall make recommenda-

tions to Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency.

Now, when this was recodified in 1982, the language "new taxes, loans,"—the words were deleted, but the House report on the recodification said that that is implied still in the new version, namely, the President is supposed to take appropriate action, and that does include new taxes.

But through the combination of sending up aggregates on spending and through taxation, the President has the leverage to keep at least his budget estimate within balance. And there is language in the Code directing him to do that.

Dr. **Ornstein**. Let me make two points, if I might, Senator.

I've had a rather vigorous correspondence with Governor Thornburgh of Pennsylvania about these kinds of issues—he is a strong proponent of constitutional change, and I am a strong opponent, and I have sent him things that I have written, and he has responded.

He has been perhaps the most aggressive governor at using his line-item veto authority. In some correspondence with me he suggests—he concedes some of the points that I made about the problems with the line-item veto, and says to his mind it can only work in combination with a strong balanced-budget amendment.

If you look at the disputes between President Reagan and the 97th, 98th, and 99th Congresses, to my mind at least they have been disputes over priorities, not amounts, and that has traditionally been the case with Presidents—the disputes are over priorities. This gives him more power to set his priorities.

I think, as I suggested before, in the end he would end up making bargains that would include some of Congress' priorities and overall spending would be likely to go up.

The second point also flows from the discussion last week: Senator Mattingly and Senator Evans both said that the President's constitutional veto authority has declined in recent years, in part because of the practice of letting appropriations bills slide and go over into continuing resolutions, so we get to the end of the session when Presidents can't veto.

I think that that is exactly wrong, that in fact the President has much greater leverage when appropriations bills slide and you get into a continuing resolution——

Senator **Ford**. I agree with that.

Dr. **Ornstein** [continuing]. And Government comes to the brink. When brinksmanship is played in that fashion, the President is much stronger. If a President really wanted to use the authority, he could wait until a continuing resolution came up right at the time of the holidays when everybody wants to go home and nobody wants to see the Government come to a halt, and have a bill of particulars and say I veto this continuing resolution and until you eliminate these items, I will bring the Government to a halt and I will take it out to the public and we will see who the public is going to blame for having this chaos. He would have much greater authority if he decided that he wanted to use it now than he would if you get individual appropriations bills coming up and subject to veto.

Senator **Ford**. Of course, he did that for 1 day.

Dr. **Ornstein**. And it worked.

Senator **Ford**. Well, I think if you go back and look at the cost of government for that 1 day—and everybody knew that it was going to be passed by Congress—and the chaotic situation, for publicity purposes—it worries me that we allow ourselves to get into that particular position and allow the President just to shut things down for a day. And those that did not go to work got paid anyhow

The **Chairman**. But clearly there would be no restraint on any President's use of this power on an ideological basis

Senator **Ford**. That's right.

Dr. **Ornstein**. No.

The **Chairman**. Which is what I suspect it would be most used for. If you didn't like a social program, you pick that out of an HHS appropriations, or if you didn't like a particular public works program, if it were in the bill you could pick that out.

But it would be done on ideological rather than fiscal grounds.

Or you could even do it in the Defense Department.

One final question that I have. Dr. Fisher, did you discuss the constitutional question with Mr. Killian?

Dr. **Fisher**. We talked about it; yes. I think there are different ways to look at this. I believe the American Law Division traditionally takes the view: What would a court do if this were litigated? Mr. Killian looked at it in terms of whether there is anything being upset here in terms of the balance between the branches.

To the extent that you maintain control over the substance of bills and you maintain control over the enrolling clerk and how the bill is cut up, and if you don't like it you will stop doing it—to that extent Congress can protect itself and the balance isn't jeopardized.

I look at it a different way. Maybe this will never get litigated; maybe a court will never decide. Maybe someone will go to court and never get standing, so you have to make a judgment whether it gets litigated or not.

The **Chairman**. If you believe the mandate of the Court in the *Chadha* case, you have to follow the constitutional prescription precisely.

This would clearly not be doing that.

It's helpful to me to review these thoughts.

Senator **Ford**. Let me ask the two gentlemen this question.

I have always been told that people vote 75 percent emotion and use the other 25 percent to convince themselves that their emotional vote was correct. The emotion here is to get the deficit down; the argument goes that the only way we can get it down is to give the power to the President.

Well, let's set that aside a minute, if we can, trying to get the emotion out of it.

Is it good policy? That's the question. Is it a good policy for this country to give a President line-item veto? If I glean from your thoughts, both of you say no.

Dr. **Ornstein**. The answer from my point of view is categorically no. It flies in the face of history; it fundamentally alters the balance of the relationships between the two branches in a way that I think would be very deleterious in many respects to the country—and it is short-sighted.

Senator **Ford**. "Deleterious" means bad? [Laughter.]

Dr. **Ornstein**. Yes, very bad.

Senator **Ford**. Very bad.

Dr. **Fisher**. Constitutional powers have moved toward the President in foreign affairs, in national security. I think Congress has an important role in these areas, but the courts have deferred a great deal to the President. One of the most important powers left to Congress is the power of the purse and the power to determine priorities.

As I mentioned last week, although Congress in 1921 directed the President to send up the budget, it reserved for itself full power on what the shape of the budget should be, whether it should be increased or decreased.

So under the item veto, with the mechanics and the motivation, incentives, you would be transferring to the President the power of the purse not just over aggregates but particularly over the mix, the priorities.

Dr. **Ornstein**. It's the most fundamental power—at least it gets close to being the most fundamental power that Congress has, so this is not a trivial question.

Senator **Ford**. It appears to me that a President with a wet pen and one-third of the votes can control Congress. In addition to that, he has his rescission ability, which he can exercise, and we have got to go through—you know, projects are stopped and the Government has to pay through the nose until Congress makes a decision on it—that becomes quite a little problem, too.

But it seems like with all the power of the Presidency, the ability to have a wet pen and a third of the votes to veto, and then the ability to rescind on top of that—I think the President has enough authority.

I would be very pleased, you know, in my State just to have had that authority rather than a line-item veto. Of course, they have changed things since I left the Governor's office; when I was Governor the legislature could not come back and override the Governor's veto. On the ninth day the Governor controlled it very effectively with a wet pen, because the legislature didn't have even the ability to override a veto under our State constitution until recently. Now they go out for 1 week or 10 days and they come back for 5 days to override or consider gubernatorial vetoes.

We have that authority here to override.

Dr. **Fisher**. If the country is concerned about deficits and about spending, as we mentioned last week, really there would be very few items going to the President under S. 43; all the particular projects and dams and so forth would not be in the bill that he would see. He could not exercise an item veto as you could at the State level. Items simply are not in the bill.

But I think if the country is concerned about the size of the budget and the size of the deficits, the most important power that the President has is to submit a budget that is closer in balance, because, as Senator Hatfield showed last week, it's important for Congress to be able to stay under the totals.

So the President would put Congress in a very embarrassing situation to send up a small budget and put you in the position of having to add to it. In terms of the public relations and the image, that is a leverage of tremendous effect—I think that is the most important leverage he has, submitting a budget that is closer to being in balance.

Senator **Ford**. Mr. Chairman, I compliment these two gentlemen and Dr. Schick for their valuable contribution, and I think their enlightenment of those of us who have had an opportunity to visit with them and those who have an opportunity to read the testimony will at least stop the Senate from the avalanche that appears to be taking place, and allow us to take a second look at really what we are doing.

And I thank you gentlemen profusely.

Dr. **Fisher**. Thank you.

Dr. **Ornstein**. Thank you.

The **Chairman**. I join with Senator Ford in thanking you for your original contribution. I think the best evidence of how valuable it was is that we extended it today, and I appreciate very much your willingness to come back today. You have been very helpful to us and, as Senator Ford says, it will be helpful to everyone who reviews it.

We will be glad to have the additional information that you have brought with you today and make it a part of the record, without objection.

Senator **Ford**. No objection.

The **Chairman**. We will also keep the record open until the end of the week. Senator Mattingly would like to submit a further statement, Senator Dole wants to submit a statement.

We also have a statement from Common Cause and a statement from the executive council of the A.F. of L. and the CIO.

[The statements referred to follow:]

## PREPARED STATEMENT OF SENATOR ROBERT DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS

Mr. Chairman. I applaud you for convening these hearings on S. 43, the item veto legislation proposed by the distinguished Senator from Georgia, Senator Mattingly. He has done us a considerable service by laying before the Congress a proposal to grant the President an item veto power and I am pleased to be a cosponsor of his bill. As far back as 1976 I advocated action to give the President of the United States the authority to veto line items in appropriations bills. Senator Mattingly's legislative proposal is similar to a constitutional amendment I proposed in 1977, along with Senator Lugar and the then-Senator from Nebraska, the Honorable Carl Curtis. This is a matter that deserves very serious consideration.

Like my amendment, the Mattingly proposal allows the President to veto part of an appropriations bill and sign the remainder of the bill. This change would restore some of the original significance of the veto power under the Constitution, should help control Federal spending, and would reduce the incentive to attach special-interest spending provisions to appropriations bills: A practice that has become all too common and which has caused severe problems over the past several years. The frequent impasses over supplemental appropriations and continuing resolutions likely could be avoided with a line item veto in effect.

### RESTRICTIONS ON THE EXECUTIVE

Under present law the President can only sign or return an entire bill. In the case of appropriations bills, which cover a wide range of spending items—especially in the case of continuing resolutions, which seem to have become standard operating procedure—the President lacks the ability to make important choices. Under the Mattingly proposal the President could veto part of an appropriations bill, while approving the rest. Each item of such a bill—each numbered section or unnumbered paragraph—would be sent to the President as though it were a separate bill, and made subject to the constitutional veto power. The President would be better able to control spending without infringing on the prerogatives of Congress. Congress still could override this specific veto just as it may override vetoes of entire bills.

The much-expanded scope and impact of appropriations bills under present procedures, including the use of riders that have an impact on substantive legislation, have radically changed the scope of the veto power compared with what the Framers of the Constitution were familiar with. By mixing items the Congress can facilitate the passage of questionable items that may lack broad support by linking them with other items the President may favor and decline to veto. This expansion of the appropriations process has eroded the veto power as drafted into the Constitution, and I believe it would be desirable to halt that erosion.

### GOVERNMENT ECONOMIES

Mr. President, there is also reason to believe that an item veto would result in significant economies to the Government. Measures that lack broad support would be more likely to fall by the wayside in the item veto process. Less pork barrel legislation, and less congressional time spent on it, would be in everyone's interest. No one criticizes Members for offering special interest provisions, because a basic part of our duty here is to guard the interests of our constituents. But if we could agree to a legislative change that would limit such provisions, we might better serve the general interest as well. It is not just budget savings I am talking about, although they are important: We also ought to concentrate on policy decisions and issues that have a broader impact.

### OBJECTIONS TO AN ITEM VETO

There are serious and well-considered objections to an item veto. There is the concern that such a power in the President would just shift the process toward a new form of "log-rolling" involving the White House as well as Congress. There is also the concern that too strong a power in the Executive could undermine our ability to meet critical needs. We do have to be sensitive to these concerns, and they deserve a close examination. But I believe that on balance an item veto would improve and streamline our procedures: That Congress would retain ample authority to guard against any Executive abuses; and that a shift away from the tendency to clutter up bills with special interest provisions would be good for the country. That is why I hope the Congress will act on this proposal in the near future.

### BROAD SUPPORT

Mr. President, most of the States, including Kansas, have provided their executives with an item veto. As of 1977 43 States had such a provision. In this area I believe we have a clear demonstration that the States can function well as laboratories for experimenting with new concepts. On the question of the item veto, as in many other matters, the States are showing us the way.

In addition, there is widespread public support for giving the President stronger power over Government spending by allowing him to veto line items. In October of 1981 the Gallup poll reported that 64 percent of those interviewed favored giving the President such a power, while only 25 percent actively opposed the idea. President Reagan has made it clear that he would welcome such authority. I believe the President would use the power effectively and judiciously. But even if we had a different Chief Executive, I believe we would be well-advised to adopt this proposal. It is a procedural reform, and Congress would retain more than adquate authority to safeguard against possible abuse.

### IMPORTANT LIMITATIONS

Mr. President, I would add that both my earlier amendment and the present proposal are limited in scope. They would only apply to appropriations bills, not substantive legislation. Senator Mattingly has, I think wisely, chosen to start with legislation to institute an item veto rather than a constitutional amendment. This gives Congress an opportunity to try out the idea, and follow through with a more fundamental change if that is deemed appropriate.

Let me just address a few of the concerns, I know some Members have with regard to the item veto, and with S. 43. First, I know that there has long been debate as to whether Congress may constitutionally legislative an item veto, or whether such action would be an improper delegation of legislative power. That should not be a concern with S. 43: It clearly grants no legislative authority to the President, but just redefines what constitutes a "bill" for purposes of the President's constitutional veto power. The Constitution does not define the term "bill," so this kind of change is clearly within our power. For further discussion of the constitutional issue, I would refer my colleagues to the analysis done by John Killian at the Library of Congress. Mr. Killian concludes it would be "too formalistic" to find an unconstitutional delegation of power in S. 43.

Secondly, some have argued that S. 43 would delegate too much authority to the Enrolling Clerk in determining what is a "vetoable" item. That is not so: Congress retains full power to instruct the Enrolling Clerk in any way it deems necessary, and the Mattingly bill does nothing to alter basic procedures for enrolling bills, which give little discretion to the clerk. Similarly, the concern that this proposal would restrict legislative riders that do not appropriate funds is unfounded. Members of Congress are sufficiently creative to structure their riders so that they would not stand out as separate matters subject to the item veto. At the same time, there is nothing wrong with giving the President greater leverage in negotiating with Congress over the specific content of appropriation bills.

This Congress should give prompt consideration to an item veto provision. It would enhance the likelihood that other fiscal restraint proposals, such as the balanced budget amendment, lead to an early balanced budget. Most proposals to enhance fiscal restraint do nothing to involve the executive branch more directly, and we may find that such additional authority to the President would make our own job easier. I know this concept generates considerable controversy in Congress. Nevertheless I think an item veto would mesh well with other reforms in the area of fiscal responsibility, and I hope that the Senate and House will act on it this year.

I commend the proposal by the Senator from Georgia to this committee, and I hope the Members will give it serious and expeditious consideration.

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U.S. Senate,
*Washington, DC, May 20, 1985.*

Hon. Charles Mathias,
*Chairman, Committee on Rules and Administration,*
*U.S. Senate, Washington, DC.*

Dear Mr. Chairman. Professor Judith A. Best, Distinguished Teaching Professor of Political Science at the State University of New York at Cortland, has provided me with her comments in response to Mr. Norman Ornstein's line item veto article in the January, 1985, issue of Fortune Magazine. I have enclosed a copy of Mr. Ornstein's article and a copy of Professor Best's memorandum. I request that both pieces be made a part of the printed record of the hearings held on S.43, legislation providing line item veto authority to the President.

Mr. Howard Jarvis, Chairman of the 600,000 member American Tax Reduction Movement, has sent me a copy of his letter to you in which he urges the Committee to pass S.43 to the full Senate. I respectfully request and urge you to make Mr. Jarvis' letter a part of the record as well.

I appreciate the opportunity to have testified on behalf of S.43. I believe the degree and depth of support that this proposal has garnered not only in Congress and within this Administration but also, and most importantly, among the American people, dictates that the full Senate have an opportunity to work its will on the legislation as soon as possible.

Sincerely,
Mack Mattingly.
Enclosures.

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[Memorandum]

State University College at Cortland,
*Cortland, NY, May 15, 1985.*

From: Judy Best.
Re: Norman J. Ornstein's Article.

Ornstein charges that the basic premise of the line item veto is that "the President is more provident than Congress." This charge is incorrect and from a rhetorical perspective (Congress as the audience) may be called poisoning the well. The premise underlying the item veto is the same as that underlying the veto: fallability in both the executive and the legislature. If the premise were the superiority of the executive to the legislature, the proposal should be for an absolute veto not an item veto which not only can be overridden but whose effectuation is within the discretion of the legislature.

The basic premise underlying the item veto is "the auxiliary precaution" of "internal controls" on Government. The basic premise is Madison's "policy of supplying by opposite and rival interests, the defect of better motives." The basic premise is rivalry and competition—with each other.

Mr. Ornstein's own premise is that Congress is more provident than the President. I think this premise is equally incorrect. It is not that Congress or the President is more able than the other "to resist the demands of special interests." Rather it is that they are respectively responsive to different interests because they are elected by different constituencies for differing terms and even because they have somewhat different constitutional powers and duties.

His conclusion that the item veto will increase spending is rather perverse in the face of his recognition that the deficit problem is a political one. He is right the problem is political, and it requires a political solution: it requires negotiation, compromise and accommodation. However, current congressional practices have reduced or destroyed congressional incentive to engage in negotiation, compromise and accommodation with the President. Current congressional practices present the President with all or nothing, take it or leave it choices. Of course Presidents will want to spend money on some things Congress does not want to fund, and, of course, Congress will want to spend money on some things the President will consider unworthy. The Founders not only anticipated this opposition and rivalry, they found it desirable and they wanted to use it. They wanted to set one side against another thus to avoid "bad laws" and errors. They created the veto so that the President and Congress would have to negotiate with each other. If the veto is effective, then both Congress and the President will have to set priorities and to accommodate each other. Since Congress has made the veto an ineffective internal control, Congress has little incentive to set priorities and to negotiate them with the President.

The problem does require a political solution but since current institutional arrangements fail to force Congress to engage in political accommodation with the President those institutional arrangements must be changed.

As Hamilton said in Federalist 73, "the oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation of those missteps which proceed from the contagion of some common passion or interest."

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[Fortune magazine, Jan. 7, 1985]

## VETO THE LINE ITEM VETO

(By Norman J. Ornstein)

### THE POWER TO KILL JUST PARTS OF BILLS WOULDN'T CURB RUNAWAY FEDERAL SPENDING; IT MIGHT EVEN LEAD TO MORE

The war on federal spending—at least the rhetorical war—will heat up in the coming months as President Reagan renews his call for the line item veto throughout the 1984 campaign, suggesting that it would be the most effective, most efficient, and least onerous way to deal with federal spending.

The idea sounds simple and sensible, and many conservatives have embraced the concept. After all, Congress frequently engages in "logrolling," adding programs for special interests that simply pad the federal budget. Then it sends the padded appropriations bill to the President, with his only alternatives being to veto the whole bill—both the good and the bad—or to swallow hard and sign it.

But conservatives should look beyond appearances and join others in opposing this idea. Rather than help contain spending, a line item veto would probably do just the opposite—increase government spending.

The problem with the line item veto starts with its basic premise: that the President is more provident than Congress. That may be true with President Ronald Reagan, but it isn't true in general. We have more to worry about from strong Presidents than a strong Congress. When the Founding Fathers allocated powers among the branches of government, they gave the basic power, and final say, over taxing and spending to the branch of government they felt was least likely to overtax or overspend—Congress.

Though you'd never know it from the political discourse of today, the Founding Fathers were basically on target. Over time, any executive-centered political system will almost certainly spend more and enlarge the scope of government more than one with substantial legislative power; witness the fate of our European allies that rely on parliamentary systems with strong executives and weak legislatures. Compared with nearly all of them, the U.S. is small indeed in the size of government and the level of taxation as a proportion of gross national product.

Through most of American history, Congress has battled parochial interests on the outside that wanted to expand government largess, and has diffused parochial members on the inside who wanted to bring home more bacon to their districts. More often than not, Congress has had to protect the public purse from Presidents pursuing expensive military objectives, wanting to buy more territory, or expanding federal involvement in commercial affairs. Overall, Congress has had great success; up to the 1970s our national debt was almost entirely rooted in the massive deficits of our major wars. Our 180 years of peacetime budgets were, on average, virtually in balance.

This is not to say that Congress is either noble or penurious. It is not. But Congress is more likely than Presidents to resist the demands of special interests. Our perception is so different because we pay so much attention to the pork barrel, the relatively small share of the budget that is directly invoiced with parochialism and logrolling.

The fact that pork is so limited is one of the main reasons a line item veto couldn't really curtail government spending. Most spending, as the Office of Management and Budget has pointed out, is not directly in the hands of the appropriations committees. Consider, for example, the $926 billion in the fiscal 1985 budget. Some $188 billion goes for Social Security; $116 billion goes to net interest payments, something a President could not item-veto; $90 billion goes to Medicare and Medicaid, and they must be changed by legislation, not an item veto.

Another $123 billion of spending is mandated by past legislation. Obligations under contracts signed in past years total another $97 billion for defense and $74 billion for domestic programs. We're left with $237 billion—but $175 billion of that is defense. That leaves, in other words, $62 billion in discretionary domestic spending as the prospective target for line item vetoes. That includes the general operating expenses of the federal government—meaning the CIA, the FBI, the national parks, and so on. The president could effectively veto very little of that whether he had the desire to or not.

And few Presidents, including Reagan, really have that desire. Driven by the same political considerations as Congress, Presidents generally support the kinds of programs that clearly stand out as wasteful. Reagan hasn't taken strong action to reduce outlays for subsidized electric power in the West, his strongest political base and the home of his closest supporters. Nor has he been much of a hawk over subsidized federal grazing lands out West or the water projects that Jimmy Carter tried to eliminate

President Reagan supported the Clinch River breeder reactor. He supported swollen farm subsidies and generous farm loan guarantees. And during the campaign he pledged to protect the benefits, not only of present Social Security recipients, but of future recipients as well. These are not the habits of an individual who would wield the item veto mercilessly.

The problem is not President Reagan; it is Presidents in general. Every President wants to make his mark on the country. Some significant part of that mark comes from proposing new programs and allocating resources for them. Part of President Reagan's ambition has been to beef up our defenses, and he has pushed for the dollars to do so. These dollars may be justified, but they are federal spending. Moreover, Reagan has proposed such new deficit enhancers as tuition tax credits, enterprise zones, and a permanent manned space station.

The bottom line is that if you give the President more power, that power is going to be used to advance presidential interests. That means that over the long run the line item veto will likely increase spending. Beyond any doubt, if the line item veto had been available last year when Congress cut 25 percent from Reagan's proposed outlays on the MX missile, calls would have been made by the White House to recalcitrant legislators suggesting that a favored dam or building would be item-erased if the lawmaker didn't support the MX. We would have paid for all those dams and buildings—and more MXs.

Yes, but what about President Reagan's aim that the item veto exists and has worked well in 43 states? We have significant evidence that the line item veto, overall, is not terribly effective inside states. As Benjamin Zycher has catalogued in the Wall Street Journal, per capita spending in the seven states lacking item veto authority actually is fewer on average than in states with some form of line item veto. Zycher concludes that the data "do not support the conclusion that line item veto power provides an effective constraint on government spending."

Given the history of our country, and the likelihood that future Presidents will be even more aggressive, innovative, and free with the government's money than Ronald Reagan, it is foolhardy for conservatives to propose a wholesale expansion of presidential power at the expense of Congress. For all of us it is important to remember two other points. First, there is no panacea for the hard work necessary to reduce Federal spending. We are all special interests, and cutting spending will bring howls of pain from every force in the society.

Second, we must realize that our problem is not institutional but political. A political problem requires political solutions. The best environment for this is two strong and confident institutions. A line item veto, by weakening Congress significantly, would damage the political environment for deficit reduction. Weaken Congress by any means, and it will have less mettle to resist pressure from interests or Presidents. Instead, we ought to devote our attention to changing the political climate. We need to change public attitudes and create a better opportunity for compromise between the President and Congress that will lead to spending restraint. Diversions like the line item veto don't help.

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AMERICAN TAX REDUCTION MOVEMENT,
*Los Angeles, CA, May 13, 1985.*

Hon. CHARLES McC. MATHIAS, Jr.,
*Chairman, Senate Committee on Rules and Administration, Russell Senate Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: In his quest to reduce government spending, the President's key weapon is missing—the line item veto. My organization, the American Tax Reduction Movement, supports Senator Mattingly's S. 43 to give the President this power.

The line item veto allows each funding measure to stand on its own merits. It will prevent items from being hidden from view under "more worthy" appropriations.

Today, the President is given two choices: take the suit, shirt, tie, cufflinks, handkerchief, and shoes or take nothing at all. The President should have the option to take what he chooses and leave the rest. Congress will still have the power to override any presidential veto.

The governors of 43 of our 50 states have been given the line item veto power by state legislators. That is why state governments are in better financial condition than the federal government. The failure of the Congress to permit a president this power is the major reason the federal government has had a deficit every year for the last 19 years.

The 600,000 member American Tax Reduction Movement is dedicated to lower taxes and sensible government spending. The adoption of the line item veto is a step toward those goals.

For the American Tax Reduction Movement I urge you to pass S. 43 to the full Senate.

Yours in lower taxes,

HOWARD JARVIS,
*Chairman, American Tax Reduction Movement.*

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COMMON CAUSE,
*Washington, DC, May 17, 1985.*

Hon. CHARLES McC. MATHIAS, Jr.,
*Chairman, Senate Committee on Rules and Administration, Russell Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: On behalf of Common Cause I am writing to express our strong opposition to S. 43, a bill to grant line-item veto power to the President. Common Cause requests that a copy of this letter be included in the record of the hearing on this bill.

Common Cause believes the line-item veto would produce a radical shift in the balance of powers, dramatically increasing Presidential power over that of the Congress. The item veto could greatly augment the President's power to affect Congressional decisions by giving the President a tool to reward or punish individual Members of Congress. On the one hand, the President could promise not to item veto programs important to a Member in exchange for the Member's support of Presidential policies and programs. On the other hand, the President could hold the item veto over the heads of Members, essentially threatening to veto district-pleasing programs unless the Members agree to go along with the White House on key votes. In addition to increasing Presidential power, such bargaining could lead on occasions to even higher levels of spending in cases where the President agrees to approve certain spending programs in exchange for legislative support for his own spending programs.

While proponents claim that the item veto would produce major spending reductions, the item veto would not address the largest and fastest growing portions of the budget. Entitlement spending, interest on the federal debt, and other mandatory costs represent approximately half the budget. These areas would fall beyond the reach of this proposal.

Over half of the budget that would be subject to an item veto goes for defense expenditures. The remaining portion of the budget—estimated at less than 15 percent of the total budget by Senate Appropriations Committee Chairman Hatfield—is for non-defense discretionary spending programs. This category of programs has already absorbed a 33 percent real dollar reduction since FY 1980. As Chairman Hatfield testified before this Committee, it is baffling to be "considering a proposal that seeks to control the only portion of the budget we have been able to control—not only control, but reduce—in recent years."

Under the Congressional Budget and Impoundment Control Act of 1974 the President has been granted the power to propose deferrals and rescissions of budget authority. Although deferrals can produce only short-term savings, rescissions become permanent upon approval of Congress within 45 days. In effect, this procedure means the President can exercise the equivalent of an item veto, but only if a simple majority of the House and Senate are prepared to support his decision. During President Reagan's first two years in office, Congress approved over 75 percent of his rescission requests, resulting in over $20 billion in reduced spending in FY 1981 and 1982.

Proponents of the item veto claim that it has been a valuable tool at the state level for checking unnecessary or unsound expenditures, deleting legislative riders, and preventing pork-barrel legislation. We question, however, whether state experience with the line-item veto has been as positive as some have portrayed it. In some states, for example, legislatures have refused to forward appropriations items to the Governor without negotiating a prior agreement on the Governor's use of the item veto. Such a political logjam in California led a federal court in 1983 to compel the State to mail welfare and salary checks during a 19-day period when the state was without a budget and the Governor without the authority to spend public funds.

Common Cause has long been involved in the battle for an effective congressional budget process. In 1974 we supported the Budget and Impoundment Control Act in order to help provide the Congress with the ability to take an integrated view of the federal budget, set priorities within the budget, and determine the scope of federal spending in light of current economic circumstances. The Congress must renew it efforts to achieve an effective budget process. But Congress must not abdicate its constitutional responsibilities to raise and spend government revenues. We strongly urge the Committee on Rules to oppose S. 43.

Sincerely,

FRED WERTHEIMER,
*President.*

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AMERICAN FEDERATION OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS,
*Washington, DC, May 22, 1985.*

Hon. CHARLES MCC. MATHIAS,
*Chairman, Senate Rules and Administration Committee, Russell Senate Office Building, Washington, DC.*

DEAR SENATOR MATHIAS: On May 20, 1985, the Senate Rules and Administration Committee completed hearings on S. 43, a bill to vest the president with the power for a two-year period to veto individual appropriation items. The purpose of this letter is to bring to the Committee's attention the AFL-CIO's vigorous opposition to that bill.

On May 7, 1985, the AFL-CIO Executive Council adopted a Statement on the Presidential Line-Veto which sets forth in detail the basis of the AFL-CIO's conclusion that the line-item veto concept is unsound. A copy of that Statement is enclosed. I would add only the following:

First, it is clear that S. 43 cannot be justified as a budget-balancing measure. Discretionary spending comprises such a relatively small part of the federal budget that there is no reason to believe that a line-item veto would have any significant impact on the deficit. Furthermore, to the limited extent that budget reductions could be affected by a line-item veto, those same reductions can equally well be achieved through the orderly deferral and rescission process provided by the Congressional Budget and Impoundment Control Act of 1974; a process that has the not inconsiderable virtue of complying with the Constitution.

Second, the real impact of the line-item veto would necessarily be to transfer power from the Congress to the President. Whereas at present the President must obtain approval from both Houses of Congress in order to rescind a line-item appropriation, with line-item veto power the President could override such an appropriation and his veto would stand unless it was in turn overridden by a two-thirds vote in each House.

We know of no justification for shifting such additional power from the Congress to the Executive. Certainly recent experience demonstrates that the President has ample ability to influence—indeed determine—both the overall fiscal policy of the Federal government and the budgetary priorities and direction of the government. Indeed, President Reagan has not only succeeded in securing enactment of most of his budgetary recommendations but has even obtained approval for over 75 percent of the rescissions he has requested.

In or judgment, where a majority of both Houses has appropriated funds for a particular program, and where the President cannot persuade a majority to rescind that appropriation, the program should be continued at the congressionally-mandated level. That is the rule under the present system. And that is precisely what the proponents of the line-item veto would change through their bill.

Third, the practical consequences of vesting the President with line-item veto power would far transcend the significance of any particular appropriations item. As the AFL-CIO Executive Council Statement observes, "if the President had his requested line-item authority, he would no longer feel obligated to engage in a dialogue with the Congress as the appropriation process unfolds simply because the President could dictate which items he would accept and which he would reject regardless of the political and legislative balance that went into the legislation." The ability of individual Senators to secure appropriations and protect programs important to their constituents thus would be significantly curtailed if not eliminated altogether. The end result would be considerable damage to the entire appropriations process.

Fourth and finally, S. 43 disparages the Constitution. Proponents of the line-item veto have, in the past, recognized that its enactment would require amending the Constitution, and have forthrightly advocated such an amendment. But S. 43 seeks to avoid the amendment process and to achieve the line-item veto through a sleight-of-hand: the bill would direct the Secretary of the Senate and the Clerk of the House to enroll each item of an appropriation bill as if enacted as a separate piece of legislation, even if, in fact, the items had been considered by Congress in a single bill.

Whether this attempt to alter the constitutional structure by legislation would pass constitutional muster is uncertain. But this much is certain: S. 43 represents a transparent attempt to make a change of constitutional magnitude in our system of government without following the procedures established by the framers for amending the Constitution.

For all of these reasons, we urge the Committee to vote not to report S. 43.

Sincerely,

LANE KIRKLAND,
*President.*

### PREPARED STATEMENT BY THE AFL-CIO EXECUTIVE COUNCIL

Efforts are under way to enact a Constitutional amendment providing the President with authority for a line-item veto. Such an amendment would give the President the power to remove from appropriations bills, on an item-by-item basis, funds that Congress has approved. The only constraint would be a Congressional override of the President's action by a two-thirds vote.

The proposal to give the President this authority would be a forfeiture of one of Congress' most basic powers, authority to appropriate funds.

The authority to give the President a line-item veto is unnecessary. The President has broad veto authority over Congressionally-passed legislation including appropriations bills. The Founding Fathers never intended the veto power to be used to usurp Congress' authority to draft the specific of appropriations legislation.

Presently, the Budget Act allows the President, subject to Congressional approval or disapproval, to rescind or defer spending appropriated for specific programs. Under this procedure, Congress has allowed more than 75 percent of President Reagan's rescission requests in fiscal year 1981 and 1982, totaling more than $20 billion.

If the President had his requested line-item authority, he would no longer feel obligated to engage in a dialogue with the Congress as the appropriations process unfolds, simply because the President could dictate which items he would accept and which he would reject regardless of the political and legislative balance that went into the legislation. Thus, overall, the line-item veto can inflict considerable damage upon the Congressional appropriation process itself.

It is unlikely that a line-item veto would achieve its stated aim, namely a more balanced fiscal policy. More likely the President, particularly this incumbent, would capriciously use the veto as a weapon of political punishment or to terminate only those spending items determined to be ideologically distasteful.

While line-item veto authority is now available to the governors in 41 states, that authority was, in most cases, given to the governors by State legislatures which meet irregularly and have little continuing authority or day-to-day oversight. The Congress, on the other hand, is in session on an almost continuous basis.

The solution to our nation's deficit lies not in Constitutional gimmickry but rather in correcting the combination of irrational tax policies, excessive defense budgets and high unemployment which created the nation's current fiscal mess. Congress, in its haste to deal with the deficit, must take care not to forfeit long-held Constitutional powers. The Congress rejected the President's balanced budget amendment in 1982 as bad economic and Constitutional policy; so should it reject the line-item veto.

The CHAIRMAN. We will hold the record open for those, and such other statements as may be submitted by the close of business on Friday.

The committee stands in recess subject to the call of the Chair.

[The committee adjourned at 2:51 p.m.]

# LINE-ITEM VETO TO PROVIDE THAT EACH ITEM OF ANY GENERAL OR SPECIAL APPROPRIATION BILL AND ANY BILL OR JOINT RESOLUTION MAKING SUPPLEMENTAL, DEFICIENCY, OR CONTINUING APPROPRIATIONS THAT IS AGREED TO BY BOTH HOUSES OF THE CONGRESS IN THE SAME FORM SHALL BE ENROLLED AS A SEPARATE BILL OR JOINT RESOLUTION FOR PRESENTATION TO THE PRESIDENT

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## THURSDAY, JUNE 20, 1985

U.S. Senate,
Committee on Rules and Administration,
*Washington, DC.*

The committee met at 2:10 p.m., in room S128, U.S. Capitol, Hon. Charles McC. Mathias, Jr. (chairman of the committee) presiding.

Present: Senators Hatfield, McClure, Dole, Stevens, Garn, Ford, Pell, Byrd, Inouye, and Simon.

Staff present: John B. Childers, staff director; William McW. Cochrane, minority staff director; Gerald W. Siegel, minority chief counsel; John K. Swearingen, director, Technical Services; Ann B. Cook, chief clerk; Peggy Parrish, professional staff member (minority); Carole J. Blessington, assistant chief clerk; Gerald Gereau, chief investigator; Dennis G. Doherty, auditor; Beth Cady, professional staff member; Waitus A. Dowless, professional staff member; Anthony L. Harvey, Sr., systems analyst (Technical Services).

The **Chairman**. The committee will come to order.

We have a discussion quorum. We can begin to look at our agenda and make comments on it.

The first item on the agenda is the confirmation of the nomination of Public Printer of the United States. In that situation I have been advised that there has been a request to the inspector general of the Government Printing Office that there be a further investigation of the fact or otherwise unexplained disappearance of his personnel files from the offices of the Government Printing Office.

Since that was a matter of some discussion in the hearing, I would propose that unless there is an objection, we will lay that over until next week. I am further advised that the inspector general can give us a report on the disappearance of the personnel file, and that we should be able to take action next week.

That would be my intention. Is there objection to letting it go until next week?

Then the other item on the agenda is Senate bill 43 introduced by Mr. Mattingly who is here to observe our tender treatment of his bill.

Senator INOUYE. Why do you not have a seat.

The CHAIRMAN. Join us.

Senator MATTINGLY. I would just as soon stand.

The CHAIRMAN. The fact that you sit will not give you a vote.

We have had two hearings on this matter. It has been discussed in some detail.

As the committee begins its consideration of S. 43, Senator Mattingly's line-item veto proposal, I think it prudent to take a few minutes to reflect on the hearings we held in May on this far-reaching measure. I find the transfer of power from the Congress to the President, which would occur if S. 43 were enacted and implemented, a disturbing proposition. I doubt the constitutionality of this bill, and I am deeply concerned about those provisions that would further centralize power in the executive branch, specifically in the Office of Management and Budget. The distinguished chairman of the Appropriations Committee, Senator Hatfield, and I had an exchange on this issue during the first day's hearing and I would like to quote from the hearing transcript, especially for those of you who could not be present.

"The CHAIRMAN [MATHIAS]. The Senator [Hatfield] refers to the constitutional process. If the Congress is wrong—and we frequently are—there is accountability. If we vote for too much expenditure, we answer for that at the next election. Who in the Senator's experience is likely to be accountable for the advice that is given to the President on a line-item veto?

"Senator HATFIELD. None of them are accountable in terms of the public.

"The CHAIRMAN. Mr. Stockman.

"Senator HATFIELD. No; he's not elected.

"The CHAIRMAN. Any of his assistants?

"Senator HATFIELD. None.

"The CHAIRMAN. As a practical matter, aren't these the people who will be highly influential in that decision?

"Senator HATFIELD. Correct.

"The CHAIRMAN. So we are really moving away from a system of representative government.

"Senator HATFIELD. We are centralizing more and more political power in the hands of the Chief Executive, in the executive branch of government."

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President Reagan and OMB have expressed strong support for the line-item veto power. David Stockman was asked on Monday of this week, at the AEI Conference on the Congressional Budget and Impoundment Control Act what the line-item veto's effect on the Federal deficit would be. In a burst of candor, David Stockman replied: "marginal, if at all." Mr. Stockman amplified his answer by saying: "Line item veto is about political power and political control. It can be used for lots of things. It would be great for the Director of OMB." This is, indeed, my and Senator Hatfield's fear.

I also was struck by the pithiness of the remark by this committee's distinguished ranking minority member, Senator Ford as he reminded us of the tremendous power the President already has in the constitutionally prescribed veto power. Speaking to Senator Evans, Senator Ford noted "Well, Senator, any President who has a wet pen and one-third of the votes can do anything he wants to."

On the question of "let the Courts decide the constitutionality of S. 43," we should be reminded of the oath of office we all take as Senators "to uphold the Constitution." Regardless of the Supreme Court being the final arbiter, this oath requires us to make our own judgments on the constitutionality of any measure or amendment we vote on.

Senator Ford, do you have comments?

Senator FORD. Mr. Chairman, I think the intention of this particular piece of legislation probably is good. But as I stated earlier in the hearing, that I felt like the only time a line item veto would be in the posture of saving money would be during the consideration of a balanced budget. Otherwise, regardless of who is President, we are going to be in a political adversarial situation. I cannot see taking the authority away from the legislative branch as it relates to the line item veto.

So, Mr. Chairman, I am ready to veto. I think most of my side is ready to vote. It would be my intention to cast a ballot to report it unfavorably.

Senator GARN. Mr. Chairman.

The CHAIRMAN. Senator Garn.

Senator GARN. Mr. Chairman, I would like to just suggest that there are some of us who are in favor of not just reporting unfavorably, and I expect that that would be the action of the committee. But I do not want my vote or proxies for the five other Senators to have anyone think that we were just voting it out so that the floor could consider it. At least there are six of us who do favor it in substance as well as reporting it out.

The CHAIRMAN. Senator McClure gives us a legislative quorum—I am sorry, one more. Fame has alluded you once more.

We will ask the staff to advise the majority leader, the chairman of the Appropriations Committee, and anyone else who is on the floor.

Senator FORD. Senators Simon and Gore have indicated their intention to be here.

The CHAIRMAN. Senator Simon is here.

I would call the attention of the committee to the summary of S. 43 on the agenda. It provides that each item of any general special appropriation bill or measure of that character shall be enrolled as a separate bill or joint resolution. The term item is any numbered section or unnumbered paragraph in the general special appropriation bill or other measure.

So that imposes on the enrolling clerk extraordinary responsibility of adding the——

Mr. CHILDERS. There are some Senators on the floor that would like to come down. They are on their way.

The **Chairman**. This imposes on the enrolling clerk the rather extraordinary responsibility of erecting each item into a separate bill. The effect of—the philosophical effect of this was debated in the hearings, the fact that it will alter the relationship between the executive and legislative branches. We do not need to debate that at any great length here.

The constitutionality question is an interesting question which no doubt the Supreme Court will ultimately make a judgment on it in light of its position in the *Chadha* case in which it defined very precisely what it considered to be the constitutional mandate for legislation. But again, that was debated during the hearing and the prior discussions of the committee.

Senator Simon.

Senator **Simon**. I have no words of wisdom other than I tend to favor the concept of the line item. I differ with many of my colleagues on that. We have been doing a little work on this, and I think there is a substantial constitutional question. And I think it almost has to be dealt with by constitutional amendment. Either that or we deal with it—you know, you pass all these individual bills. I do not think you can deal with it——

The **Chairman**. I would think there is a constitutional question. I think there is also a philosophical question that every member is going to have to face. This puts the President in a different power relationship to each Member of Congress if the President can delete an Illinois item or Idaho item.

Senator **Garn**. Or he could balance the budget if we had just to veto New York State items.

The **Chairman**. But that is a matter each individual will have to consider.

Senator **McClure**. Mr. Chairman.

The **Chairman**. Senator McClure.

Senator **McClure**. I would not belabor the discussion except we are waiting for someone else to arrive, and I realize——

The **Chairman**. What is known on television as a filler.

Senator **McClure**. Yes. And in the newspapers it is known as a filler. And often times it is words more than I am going to say.

First of all, I do not like the *Chadha* decision. I think the clerk was ill-advised in making that constitutional principle apply to separation of power in an attempt to balance the ability of the Congress to delegate authority and retain authority or those in the Congress to write legislation but fine tune its application without having to go through the full legislative response to what we believe may be excessive or erroneous administration interpretation or application of the law.

The relationships between the executive and legislative branches have evolved over the years and are continuing to evolve. And as I say, I regret the *Chadha* decision. And Congress is going to have to find some way to address that situation as it now exists.

We just completed that action on an amendment upstairs to the pending bill in that very area. We are trying to find a way to get the administration to agree to a certain amount of legislative oversight in the administration of a statute.

In this instance, as in many others, we have arrived at an accommodation with the executive branch where they agree to abide by a process which they will assert they are not bound to abide by. And that in selective cases will work.

I think a great many people are legitimately concerned about the extension of the Executive power by line item veto. I am one of those concerned about that. I would not vote for a constitutional amendment at this time with a line item veto for the reason of that concern. But I am willing to vote for, and do support, a temporary legislative provision that will permit it be tried for a while and see how it works.

It may not work at all. And if so, it ends. If it works well, perhaps we will take another look at it.

The CHAIRMAN. Is there a motion?

Senator FORD. Mr. Chairman, I move that we report this legislation unfavorably.

Senator INOUYE. Second.

The CHAIRMAN. Moved and seconded.

Senator GARN. Mr. Chairman, can we back that up because some of us would like to vote for it first. When that is defeated, then we can go to the second process.

The CHAIRMAN. The Senator from Kentucky will withhold his motion on it.

Senator FORD. Well, I do not see any need to vote on it twice when you know the outcome. Your no vote will be a yes for it. So one vote is enough.

Senator GARN. But it ends up being a vote to report unfavorably.

Senator FORD. Well, you can vote against reporting it unfavorably.

The CHAIRMAN. Before we decide——

Senator GARN. We can do both when we are arguing——

The CHAIRMAN. I might say to the Senator from Utah, under the rules of this committee, proxies will not affect the vote. It is live vote only. So we might want to count heads.

Senator FORD. Proxies cannot apply.

The CHAIRMAN. I personally would not be offended if it went that way, but I feel obliged to point that out to you.

Senator DOLE. What about a voice vote?

The CHAIRMAN. We can take a voice vote on a motion to report favorably.

Senator GARN. Well, we know the votes are not there to report favorably. We could have had it done while we were discussing it. But those of us who are here will vote for it, an we will vote to report it unfavorably.

Senator DOLE. Let us be recorded.

Senator INOUYE. Why do we not have two votes?

Senator FORD. There will only be three aye votes then on that, based on the decision of the chairman in respect to proxies in reporting legislation out of committee.

Senator GARN. I move that we report favorably.

The CHAIRMAN. All in favor say aye.

[Chorus of ayes.]

The CHAIRMAN. Opposed no?

[Chorus of noes.]

The CHAIRMAN. It is the opinion of the Chair the noes have it.

The motion from the Senator from Kentucky is now in order. On that the clerk will call the role.

Senator **Byrd**. What is the question?

Senator **Ford**. Reporting the line item veto legislation unfavorably.

The **Chairman**. Senator Hatfield.

Senator **Hatfield**. Aye.

Mr. **Childers**. Senator McClure.

Senator **McClure**. Aye.

Mr. **Childers**. Senator Helms.

[No response.]

Mr. **Childers**. Senator Warner.

[No response.]

Mr. **Childers**. Senator Dole.

Senator **Dole**. Aye.

Mr. **Childers**. Senator Stevens.

[No response.]

Mr. **Childers**. Senator Garn.

Senator **Garn**. Aye.

Mr. **Childers**. Senator Ford.

Senator **Ford**. Aye.

Mr. **Childers**. Senator Pell.

Senator **Pell**. Aye.

Mr. **Childers**. Senator Byrd.

Senator **Byrd**. Aye.

Mr. **Childers**. Senator Inouye.

Senator **Inouye**. Aye.

Mr. **Childers**. Senator DeConcini.

[No response.]

Mr. **Childers**. Senator Simon.

Senator **Simon**. Aye.

Mr. **Childers**. Senator Gore.

[No response.]

Mr. **Childers**. Chairman Mathias.

The **Chairman**. Aye.

Senator **Ford**. Mr. Chairman, I would like to report that Senator DeConcini submitted a proxy and voted aye. That proxy should be allowed.

Senator **Dole**. I have some proxies that voted aye, aye on the voice vote.

Mr. **Childers**. Ten voted favorably, 10 to nothing.

The **Chairman**. Is there further business to come before the meeting?

We stand adjourned.

Mr. **Childers**. With Senator Stevens, 11 to zero.

[The committee adjourned at 2:25 p.m.]

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